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Report of the Federal Trade Commission on the Sale and Distribution of Milk, 75th Cong., 1st Sess., H. Doc. 95 (1937) — 26

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S. Rep. No. 221, 75th Cong., 1st Sess — 37

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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The court of appeals filed no opinion, other than that contained in its judgment (R. 153–155), which is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1966 (R. 153–155). The petition for a writ of certiorari was filed on January 31, 1966, and granted on February 18, 1966 (R. 161). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The Federal Trade Commission is authorized and directed to enforce Section 7 of the amended Clayton

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Act—the merger law—by issuing complaints a
er appropriate hearings, divestiture orders. A
son or firm against whom such an order is
may seek judicial review thereof in the court
peals.

The question presented is whether the court
peals has power under the "all writs" statu
U.S.C. 1651(a)) to issue a preliminary inj
maintaining the *status quo* pending comple
the Section 7 proceeding, where such an injun
necessary to preserve the possibility of an e
remedy against the merger if it should be
illegal.

STATUTES INVOLVED

The relevant statutory provisions are 28
1651(a) and Sections 7, 11, and 15 of the Clayt
as amended, 15 U.S.C. 18, 21, and 25. They are
in Appendix C, *infra*, pp. 48–51.

STATEMENT

Until recently, Dean Foods Company ("
and Bowman Dairy Company ("Bowman") w
stantial competitors in the sale of packaged
the Chicago area. On December 13, 1965, De
Bowman entered into an agreement which p
that Bowman would sell to Dean all Bowman
and equipment, the Bowman name, "[t]he bene
relationships with suppliers and customers,"
tomer and supplier lists, and various other t
and intangible assets. (R. 16.) Thus und
terms of the agreement Bowman would cease
going dairy business.

1. PROCEEDINGS IN THE COMMISSION

On November 2, 1965, counsel for Dean, speaking as well for Bowman, met with representatives of the Commission's Division of Mergers to discuss the proposed acquisition. Dean stated, however, that it did not wish to obtain a formal advisory opinion as to the acquisition's legality under Section 7 of the Clayton Act (15 U.S.C. 18), as it could have under the Commission's Rules (16 C.F.R. 1.51–1.54). (R. 150–151.)

The Commission's staff made an immediate investigation of the proposed acquisition. The investigation disclosed that the proposed acquisition would eliminate all competition between the largest and the third largest firms in the Chicago milk market, already highly concentrated. Dean claimed that Bowman was losing money in its dairy business, but the Commission's investigation showed that Bowman was, in fact, making an overall profit despite some losses from its dairy operations. The Commission's investigation also disclosed that at least one other dairy had an interest in acquiring Bowman and continuing its dairy operations in the Chicago market and that there was no evidence Bowman had made any effort to obtain other purchasers. (See R. 45–46.)

On December 3, 1965, the Chief of the Commission's Division of Mergers advised Dean's counsel that the Commission's staff believed the acquisition would raise serious questions under the antitrust laws, and that, on the basis of the information then available, the staff would recommend to the Commission that it issue a complaint against the acquisition. At a further

conference between Dean's counsel and the
sion's staff on December 7, 1965, Dean sug
possible modification of the transaction—pr
divestiture of Bowman's retail home deliv
routes in Chicago. Since this would have l
in possession of Bowman's most lucrative a
business, particularly in the Chicago area,
mission's staff was unwilling to accept the

Subsequently, on December 14, 1965, Dean'
advised the Commission's staff that a purcha
ment had been executed. (R. 152.)

On December 22, 1965, the Federal Trade
sion, pursuant to Section 11(b) of the Clayto
amended, 15 U.S.C. 21(b), issued a formal c
charging that the purchase agreement viola
tion 7 of the Clayton Act, as amended, 15 U
and Section 5 of the Federal Trade Commissi
U.S.C. 45. The complaint alleged that Dean
proximately the twelfth largest dairy compa
United States with total sales in 1964 of $7
and third or fourth largest in the Chicago a
approximately 7 percent of all packaged mi
that Dean was a profitable and growing comp
net income after taxes in the past five years
9.5 percent to 13.5 percent of net stockholde
ment (R. 8, 12); and that Bowman was appro
the eleventh largest dairy company in the
States with total sales in 1964 of $77 million
largest or second largest seller of packaged m
Chicago area with 16 percent of all sales in
(R. 9.) The complaint further alleged tha

tration at the national level in the sale of packaged milk had reached formidable levels; that in the Chicago area the four largest dairy companies accounted for 43 percent of the sales of packaged milk, while the remaining dairies were vastly inferior in size; and that the probable effect of Dean's acquisition of Bowman would be to lessen competition substantially, in violation of Section 7 and Section 5 (R. 10–13).

2. PROCEEDINGS IN THE COURT OF APPEALS

The purchase agreement originally provided that the transfer of assets would take place on January 3, 1966 (R. 19). On December 30, 1965, the Commission filed a petition in the Court of Appeals for the Seventh Circuit seeking an order under 28 U.S.C. 1651(a) enjoining Dean and Bowman from taking any steps to carry out the agreement pending completion of the Commission's adjudication of its complaint. The petition stated that, "[i]n the circumstances, it is probable that the Federal Trade Commission will enter an order finding a violation" and that "the imminent consummation of this acquisition will prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." (R. 4, 3.)

Attached to the Commission's petition (and to its reply memorandum) were affidavits reciting the factual support for the allegations of its administrative complaint, and alleging further that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57 (R. 89),

and that, within the last four months alone, a
four more such firms had gone out of the ma
two as the result of acquisitions (R. 38–39). Fu
more, Dean had indicated that shortly after
quired Bowman it would dispose of the latter's
home delivery milk routes, consolidate the oper
of the two companies, and close various Bo
plants (R. 41). The likelihood of restorati
Bowman as an independent competitor was
lessened by Bowman's intention to retain 25 p
of the assets for distribution to its stockholders (
Thus, it was alleged, if Dean carried out its pla
the disposition of Bowman's assets, restoration o
man as a viable independent company would
tually impossible, even though the acquisition
sequently adjudged unlawful (R. 5).

In its response to the Commission's petition
did not dispute these allegations, contending,
that Bowman's officials had decided: (1) tha
wished to leave the market, (2) that unless they
find a purchaser for Bowman's operating asse
should proceed to liquidate the business beca
operating losses in recent years, and (3) that
half of Bowman's dairy operation in the C
area—the operation of retail home delivery ro
was no longer profitable in view of supermarke
petition. Dean also alleged that it feared it
presently lose its principal supermarket accou
that it needed Bowman's supermarket accou
offset this. (R. 59–61, 65, 70.)

On January 4, 1966, the court of appeals entered a temporary restraining order enjoining the companies from consummating the acquisition until five days after the denial of any injunctive relief (R. 53–54). On January 19, 1966, without deciding the merits of the Commission's petition, the court held that it had no power to grant the requested relief. Its judgment (R. 154) stated that

> * * * in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission.
>
> Inasmuch as no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and inasmuch as we now hold that the Commission did not have authority to institute this proceeding in this court, IT IS HEREBY ORDERED that the temporary restraining order issued herein is dissolved and the petition filed herein and this proceeding are dismissed.

3. THE CONSUMMATION OF THE MERGER

The original purchase agreement specifically provided that Dean was free "to cancel this Purchase Agreement without penalty if on or before * * * [the closing date] a complaint seeking an injunction,

preliminary injunction or temporary restraining order has been filed (and * * * has not been dismissed prior to the Closing Date) by any governmental agency, commission, or department * * *'' (R. 27). After the Commission's proceeding in the court of appeals was instituted, Dean and Bowman amended their agreement and extended the closing date until January 10, and, during the following days, the parties extended the closing nine more times (see exhibits 1, 3–10 (unprinted) to the Adamson affidavit (R. 156)). When the court of appeals dissolved its temporary restraining order at 11 a.m. on January 19, Dean and Bowman did not execute a further extension of the closing date. Instead, they closed the contract at 2 p.m., and Bowman transferred legal title to the assets involved to Dean. (R. 156–157.)

All operating assets formerly owned by Bowman are now owned by Dean, and all operations since the closing date have been conducted under Dean's supervision and direction. Bowman has ceased to be a dairy business. Its corporate name has been changed to Bowfund Corporation, and it has become an investment fund. The assets of this fund consist of the cash and marketable securities which were excepted from the purchase agreement and the proceeds of the sale to Dean—approximately $12.5 million in all.

4. PROCEEDINGS AFTER THE COURT OF APPEALS' DECISION

On January 20, 1966, the Solicitor General, on behalf of the Commission, applied to Mr. Justice Clark, as Circuit Justice, for an order enjoining further changes in the acquired assets. After consultation with the Court, Mr. Justice Clark filed an opinion

tating that he had determined to issue an order stay-
ng further action consummating the merger, pending
he disposition of a petition for certiorari (App. A,
nfra, p. 45). On January 24, 1966, Mr. Justice Clark
ntered a preliminary injunction against the respond-
nts' making any material changes with respect to the
tructure of Bowfund or the assets purchased by Dean
rom Bowman. The order provided, further, that
Dean might sell Bowman's Chicago area retail home
elivery routes upon terms and conditions acceptable
o the Commission; in making such sales, Dean was
irected to supply milk to the purchasers of the routes,
f at all, under the Bowman rather than the Dean label,
nd from former Bowman plants (App. B, *infra*, pp.
6-47). On February 18, 1966, this Court granted
ertiorari (R. 161.)

SUMMARY OF ARGUMENT

The Federal Trade Commission issued a complaint
harging that the acquisition of the operating assets
f Bowman Dairy Company by Dean Foods Com-
any would violate Section 7 of the Clayton Act, as
mended. The acquisition was to be consummated
hortly, and Dean planned to dismember Bowman's
airy business. Fearing that these steps, if carried
ut, would make it impossible to restore Bowman as
n effective competitor in the event that the acquisi-
ion was found unlawful and divestiture ordered, the
Commission applied to the Court of Appeals for the
eventh Circuit—where respondents could seek judi-
ial review of any remedial order eventually entered
y the Commission—for a preliminary injunction

against the merger to preserve the possibility of a
fective remedy. The Commission invoked the
writs" powers of the court of appeals. 28 U.
1651(a). In a brief opinion, the court dismissed
application for want of jurisdiction. We think
was error.

I

Section 1651(a) of the Judicial Code provides
the federal courts may issue writs ancillary to t
jurisdiction. The issuance of a preliminary inj
tion by a court of appeals having potential juris
tion of an administrative proceeding—the positio
the Seventh Circuit here—is a traditional applica
of this power. The only arguably novel element
is that the agency itself, rather than a private
gant, was the moving party. But, as a matter
of precedent and of policy, this makes no differe
The public has an interest, appropriately vindic
by the agency, as great as any private litigant'
preserving orderly judicial procedures of relief an
preventing their circumvention by action of the
ties to the administrative proceeding designed
defeat the effective jurisdiction of the agency and
reviewing court.

II

We do not rest with showing that the judicial p
er invoked by the Trade Commission in this case
within the traditional scope of the "all writs" stat
since respondents contend that Congress, in establ
ing a comprehensive system of enforcement in

Clayton Act, intended to displace traditional principles governing the relationship of court and agency. We go on to show that the policy of the Act supports this customary exercise of judicial power.

The legislative history of the merger law demonstrates that Congress intended the Commission to play an effective enforcement role, fully co-equal with the Department of Justice. This implies that the Commission should be able to assume primary responsibility for merger enforcement in those industries where, by virtue of greater experience and knowledge, it is better equipped than the Department to administer the law effectively. This is the essence of the constructive system of dual enforcement that Congress envisioned.

The system is gravely undermined if, as the court below held, only the Department may obtain preliminary relief in a merger case. There are some cases—the present is one—where such relief is essential if there is to be any hope of effectively remedying the injury to competition caused by the illegal merger. If, as here, such a case arises in an industry where the Commission should be primarily responsible, shunting the matter to the Department for purposes of obtaining a preliminary injunction would disrupt the proper functioning of the dual enforcement system. In these circumstances, invocation of the reviewing court's "all writs" power to preserve its appellate jurisdiction of Commission proceedings is a pre-eminently rational solution to a dilemma that Congress never intended to create.

III

This is thus a strong case for the application
traditional principles of judicial power codi
Section 1651(a), rather than for an exceptio
there is no serious objection to this result. Co
omission to provide expressly for the issuance
liminary injunctions by courts of appeals in
Trade Commission merger cases does not rei
intent to withdraw the courts' historic powers
the all writs statute. Nor do other provisions
Congress has made for preliminary relief in th
ton Act and other statutes enforced by the Com
evince such an intent, all having been adopted
texts different from the present one and without
to the problems of effective merger enforcement.
gress' inaction in the face of proposals by the
mission that it be granted specific powers w
spect to obtaining preliminary relief is also
out controlling significance, especially since
proposals differed markedly from the approach
by the Commission in this case of invoking
1651(a). Finally, the courts of appeals are e
appropriate forums to entertain applications f
liminary injunctions in FTC merger cases; st
plications similar in character and difficulty
staple feature of their jurisdiction. In sum, th
tion urged here is entirely proper and essen
the implementation of congressional intent f
enforcement of Section 7.

ARGUMENT

INTRODUCTION

This case presents a procedural question of major practical importance in the administration of Section 7 of the amended Clayton Act (15 U.S.C. 18)—the merger law. Since the question arises out of the dual system which Congress established for enforcement by public agencies[1] of the prohibitions of the Clayton Act, we preface our argument with a brief description of that system.

Section 15 of the Act (15 U.S.C. 25) empowers the federal district courts to entertain equity actions brought by the Department of Justice "to prevent and restrain" violations of the Act. Section 11 (15 U.S.C. 21) establishes a concurrent administrative enforcement jurisdiction. Thus, for every violation of the Act, both the Department and one of the federal administrative agencies have the power to initiate a remedial proceeding. Section 11(a) parcels out enforcement responsibility among the administrative agencies along the lines of their regulatory jurisdictions. Thus, the Federal Reserve Board is empowered to enforce the Act where applicable to banks, the Inter-State Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, etc.—and the Federal Trade Commission "where applicable to all other character of commerce." The Trade Commission thus has Clayton Act jurisdiction over

[1] There are also provisions for enforcement by private individuals or firms injured by a Clayton Act violation. Section 16, 15 U.S.C. 26 (injunctive proceedings); Section 4, 15 U.S.C 15 (treble damages). These provisions are not involved here.

the entire unregulated sector of the economy. S
the prohibitions of the Act are in many insta
inapplicable in regulated industries, in general
the Trade Commission has occasion to enforce the
administratively.

The basic procedure for administrative enforce
is prescribed in Section 11(b), which provides tha
agency, if it has reason to believe that the Act
been or is being violated, shall issue and ser
complaint and afford the respondent a hearing.
hearing is normally a trial before a hearing exam
which differs little in basic character or proce
from a district-court equity trial.[2] The age
staff prosecutes the action in accordance with
separation-of-functions provisions of the Admini
tive Procedure Act (5 U.S.C. 1004(c)), and both
counsel and respondent may appeal the exami
decision to the full agency. If the agency, on
basis of the record before it, concludes that the
has been violated, it may issue a remedial o
equitable in character. If the agency dismisses
complaint, the matter ends there. If it issu
remedial order, the respondent, by virtue of Se
11(c), has a right to seek judicial review of the o
in the federal court of appeals of any circu
which the respondent resides or does business o
violation occurred. If the court of appeals af
the Commission's order, it issues its own orde
forcing the Commission's.

[2] For the particulars of the procedure in Federal
Commission cases, see 16 C.F.R. 3.1–3.28 (Rules of Practi
Adjudicative Proceedings).

In cases brought by the Department of Justice to enforce the Act, Section 15 expressly authorizes the district court, pending final decision, to "at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." In cases originated by one of the administrative agencies, Section 11(c) provides that after the agency issues its final order and respondent has filed a petition for review of the order in the court of appeals, the court may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." But there is no reference to any form of preliminary relief between the time the complaint is issued and the time that respondent petitions for judicial review of the agency's final order.

The sole issue of this case is whether, after the Federal Trade Commission has issued a complaint charging a violation of Section 7, but before it has issued its final order, a court of appeals to which such order could be appealed may on the Commission's application issue a preliminary injunction to maintain the *status quo* pending completion of the proceeding, if such an injunction appears necessary to preserve the possibility of an effective administrative remedy. We find such power in Section 1651(a) of the Judicial Code, which authorizes the federal courts to "issue all writs [including injunctions [3]] necessary or appro-

[3] *E.g., Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399; *Stell* v. *Savannah-Chatham County Bd.*, 318 F. 2d 425 (C.A. 5); *Harrison Beverage Co.* v. *Hunsberger*, 65 F. 2d 873 (C.A. 3).

priate in aid of their respective jurisdiction
agreeable to the usages and principles of law."
judicial power invoked in this case is, as we
within the scope of Section 1651(a), and accord
the design and purpose of the merger law.

The principle that the Commission seeks to
lish in this case is an important one; as we expl
is fair to say that the fully effective enforcem
the merger law depends upon it. But it is a li
principle. Its premise is not that Section 16
grants blanket authorization to reviewing cou
grant preliminary relief on behalf of administ
agencies, but rather that the section constitutes
serve of authority which may be drawn upon in
where its invocation is necessary to the fulfillm
the agency's statutory responsibilities and is
conflict with any provision or policy laid do
Congress to govern the agency. Since our belie
the present case presents such a situation is foun
a consideration of the policy underlying Co
grant to the Federal Trade Commission of conc
jurisdiction to enforce the amended Section 7,
not suggest that similar relief under Section 165
necessarily available to other administrative ag
or with respect to other provisions of the Clayto

Nor do we contend that Section 1651(a) perm
compels a court of appeals to grant preliminary
in a merger case as a matter of course. The
must determine whether, in the particular ci
stances, the injunction is necessary or appropri
aid of its jurisdiction. In making such dete

tion, the court undoubtedly enjoys a broad discretion, to be exercised in conformity with equitable principles. That discretion was not exercised here. The court dismissed the Commission's application for preliminary relief at the threshold, holding that it had no jurisdiction to grant such an application. Hence, we do not ask this Court to rule that the Commission is in fact entitled to the relief sought. That question requires consideration of the particular facts and circumstances here—a matter for the lower court in the first instance.

I. AN INJUNCTION MAINTAINING THE *STATUS QUO* PENDING COMPLETION OF AN ADMINISTRATIVE PROCEEDING, WHERE ISSUED ON THE AGENCY'S APPLICATION BY A COURT TO WHICH THE AGENCY'S FINAL ORDER COULD BE APPEALED, AND WHERE NECESSARY TO PRESERVE THE POSSIBILITY THAT SUCH ORDER WILL FURNISH AN EFFECTIVE REMEDY, IS WITHIN THE TRADITIONAL SCOPE OF 28 U.S.C. 1651(a).

The Federal Trade Commission issued a complaint under Section 11(b) of the Clayton Act charging that the effect of the acquisition of Bowman by Dean might be substantially to lessen competition in the sale of packaged milk in the Chicago area, and hence that the acquisition was prohibited by Section 7 of the Clayton Act. Any order of divestiture or other remedial order issued by the Commission after hearings on the complaint would be appealable by respondents to the Court of Appeals for the Seventh Circuit, where they reside and do business and where the violation occurred. The Commission applied to the court for a preliminary injunction to prevent consummation of the acquisition, alleging that such consummation

would "prevent the Commission from devis
render it extremely difficult for the Commissio
vise, any effective remedy after its decision
merits." (Statement, *supra*, p. 5.) Assumin
allegations to be true (as we must, since the
appeals dismissed the Commission's applica
jurisdictional grounds without considering an
Commission's factual allegations), the initial q
is whether the application stated a claim of t
cognizable under 28 U.S.C. 1651(a), on wh
Commission predicated jurisdiction.

Section 1651(a) authorizes the federal co
issue "all writs necessary or appropriate in
their respective jurisdictions and agreeable
usages and principles of law." This grant of
has been held to authorize courts having a
jurisdiction over administrative action to "p
the *status quo* by injunction pending review
agency's action through the prescribed statuto
nels." *Arrow Transp. Co.* v. *Southern R.*
U.S. 658, 671, n. 22; see *Scripps-Howard Rad*
v. *Federal Communications Commission*, 316
Whitney Bank v. *New Orleans Bank*, 379 U
425; *Eastern Greyhound Lines* v. *Fusco*, 310 F
(C.A. 6); *Board of Governors* v. *Transameric*
184 F.2d 311 (C.A. 9), certiorari denied, 3
883; *Public Utilities Commission* v. *Capital*
Co., 214 F.2d 242 (C.A.D.C.). These decision
clear that the standard for granting such an
tion is not necessity to prevent ouster of the
ing court's jurisdiction. Such an injuncti
properly issue—as appropriate in aid of jurisd

to prevent any change in the *status quo* that would substantially impair the effectiveness of the court's ultimate judgment, even though there is no danger that the court would lose jurisdiction of the matter completely. Cf. *Continental Ill. Nat. Bank* v. *Chicago, R.I. & P. Ry,* 294 U.S. 648, 675; *Looney* v. *Eastern Texas R.R.,* 247 U.S. 214, 221. And since "jurisdiction" within the meaning of the all writs statute includes prospective jurisdiction (*McClellan* v. *Carland,* 217 U.S. 268, 280; *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21), it is equally clear that the power to issue such an injunction may be invoked while the matter is still before the agency, and judicial jurisdiction, technically, has not yet attached.

In short, a court having review jurisdiction (present or potential) over an administrative proceeding is authorized by Section 1651(a) to issue such orders as may be required to assure effective judicial review of the agency's final action. This test was met here. The Commission applied to the Court of Appeals for the Seventh Circuit—a court having potential jurisdiction of the Commission's proceeding against Dean and Bowman—for an injunction to maintain the *status quo pendente lite,* alleging that without such an injunction the jurisdiction of the Commission to issue an effective remedial order—and hence the jurisdiction of the Seventh Circuit to render an effective judgment on review of the Commission's final order—would be defeated or gravely impaired.

It makes no difference that here it is the agency itself, not a private party involved in or affected by

the administrative proceeding, that is invoking all-writs powers of the court of appeals. *Board of Governors* v. *Transamerica Corp.*, *supra*; *Public Utilities Commission* v. *Capital Transit Co.*, *supra*; cf. *National Labor Relations Board* v. *Underwood Mach.*, 198 F. 2d 93 (C.A. 1).[1] The judicial remedy provided by the review procedures of the Clayton Act is for the benefit of the Commission as well as the respondent, and this should suffice to confer standing on the Commission to invoke the all-writs power of the reviewing court where necessary to protect such remedy. A Commission order has no finality or effective

[1] In *Transamerica*, the Federal Reserve Board instituted administrative action under Section 7 challenging an acquisition of bank stock (see p. 15, *supra*). It sought an injunction from the Ninth Circuit (one of the courts of appeals which would have had jurisdiction of any final order the Board might issue) to prevent the transfer of the acquired bank assets in a manner which, under Section 7 as it then stood, would have precluded the Commission from entering an effective order with respect to the challenged acquisition. See *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, 291 U.S. 587, 599; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 339, n. 17. The Ninth Circuit granted the stay and this Court denied certiorari. *Transamerica*, which has been repeatedly cited with approval by this Court in related contexts (*Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671-672; *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 421), cannot validly be distinguished from the present case on the ground that there the threatened action of the parties to the acquisition would have wholly deprived the Commission of power to enter a remedial order against the acquisition, while here some order, albeit an inadequate one, could be entered even if a preliminary injunction was denied. As we point out in the text, *supra*, Section 1651(a)'s authorization of writs necessary or appropriate in aid of jurisdiction includes orders issued to maintain the *status quo* in order to enable an *effective* judgment to be entered even if the court's jurisdiction is merely threatened.

when entered. Unless the respondent forgoes his right of judicial review, it becomes final and binding only when it is affirmed by the reviewing court. If the court affirms, moreover, it is directed by Section 11(c) of the Act to "issue its own order commanding obedience to the terms of" the Commission's order—and violation of the court's order is a contempt. If, at the outset of the Commission proceeding, a respondent takes action that would preclude the Commission from entering an effective order against the merger and thus bar judicial review of such an order, the effect is to circumvent orderly judicial procedure and deprive the public of judicial, as well as administrative, enforcement.

It would be anomalous to subordinate the public rights vindicated by the Commission to the private interests of persons affected by administrative proceedings. That would be the result, however, if the courts of appeals were deemed helpless to protect the Commission's power to issue effective remedial orders, while at the same time a competitor or customer affected by the merger could presumably invoke the court's all-writs powers. *E.g., Whitney Bank* v. *New Orleans Bank, supra.* Such a disparity would be especially ironic since Congress has manifested specific concern with effective merger enforcement by the Federal Trade Commission (see pp. 25–26, *infra*).

We derive additional support for our views of the scope of Section 1651(a) from the long-recognized principle that courts of equity have inherent power to grant temporary relief in aid of, or ancillary to, a principal action in another forum in order to preserve the *status quo* and prevent irreparable injury while the principal action is in progress. *Erhardt* v. *Boaro,*

113 U.S. 537; 2 Story, *Equity Jurisprudence* (14
ed.), §§ 1232–1235, 1238. Often the other forum,
in this case, has been an administrative agency. *E.*
United States v. *Parrott*, Fed. Cas. No. 15,998, 27 Fe
Cas. 416 (N.D. Cal.); *West India Fruit & Steamsh*
Co. v. *Seatrain Lines*, 170 F. 2d 775 (C.A. 2), ce
tiorari dismissed, 336 U.S. 908; *Isbrandtsen* v. *Unit*
States, 81 F. Supp. 544 (S.D. N.Y.), appeal d
missed, 336 U.S. 941; *Pennsylvania Motor T. Ass'n*
Port of Phila. M.T. Ass'n, 183 F. Supp. 910, 916, 9
(E.D. Pa.).[5] Thus, a federal district court has be
held to have the power "to assist the [Federal Ma
time] Commission by preserving the status quo un
it [the Commission] could determine * * * how
should act." *West India Fruit & Steamship Co.*
Seatrain Lines, *supra*, p. 779; cf. *Evans* v. *Inter*
tional Typographical Union, 76 F. Supp. 881, 8
(S.D. Ind.). This is precisely what the Trade Co
mission asked the Seventh Circuit to do here,
invoking that court's power under Section 1651(a

II. THE POLICIES WHICH UNDERLIE THE CONGRESSION
PROVISION FOR CONCURRENT ENFORCEMENT OF T
MERGER LAW BY THE DEPARTMENT OF JUSTICE AND T
FEDERAL TRADE COMMISSION SUPPORT—INDEED
QUIRE—RECOGNITION THAT THE COURTS OF APPEA
ALL-WRITS POWERS EMBRACE THE RELIEF SOUGHT
THE COMMISSION IN THIS CASE

We do not rest with a showing that the judic
power invoked by the Commission in its applicati

[5] In *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 6
this Court found a congressional intent to abrogate such inh
ent equity powers with regard to certain rate orders of
Interstate Commerce Commission. As we show in parts
and III of our argument, no comparable intent exists w
respect to merger proceedings before the Trade Commission

to the Seventh Circuit for preliminary relief is within the traditional scope of 28 U.S.C. 1651(a). For we recognize that the creation of a comprehensive system of enforcement and administration, as in the Clayton Act, may, in some circumstances, curtail traditional judicial powers. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671, n. 22. The scheme of regulation may strike a delicate balance that would be disturbed by recognizing judicial powers other than those expressly conferred therein (*Arrow Transp. Co.* v. *Southern R. Co., supra*), or may contain special provisions in light of which additional remedies would be redundant.[6] In this part of our argument we show that, far from there being any conflict between the relevant provisions of the Clayton Act and the powers conferred by Section 1651(a), the policy of these provisions requires, as an important corollary, that such powers be recognized as available in this context.[7]

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[6] The Clayton Act contains no provision that would authorize the Commission to obtain an injunction prior to entry of its final order. In contrast, some of the statutes enforced by the Commission having to do with consumer protection authorize the Commission to seek an injunction in a federal district court pending issuance of its final order. Section 13 of the Federal Trade Commission Act (Wheeler-Lea Amendments), 15 U.S.C. 53; Section 7(b) of the Wool Products Labeling Act of 1939, 15 U.S.C. 68e(b); Section 9(b) of the Fur Products Labeling Act, 15 U.S.C. 69g(b); Section 6(a) of the Flammable Fabrics Act, 15 U.S.C. 1195(a); Section 8 of the Textile Fiber Products Identification Act, 15 U.S.C. 70f. See p. 38, *infra*. We do not argue that the Commission could seek a § 1651(a) writ from the court of appeals in a case where relief in the district courts under one of these provisions was available.

[7] In the next part of the argument, we answer some specific objections to this conclusion.

A. THE HISTORY OF THE MERGER LAW EVINCES A CLEAR CONGRESS
INTENT THAT THE COMMISSION PLAY A FULLY CO-EQUAL, EN
MENT ROLE—WHICH IMPLIES THAT THE COMMISSION SHOUL
PRIMARY RESPONSIBILITY FOR MERGER ENFORCEMENT IN
INDUSTRIES WHERE IT HAS SPECIAL KNOWLEDGE AND EXPE

1. The history of Section 7 of the Clayton A
recounted at length in *Brown Shoe Co.* v. *U*
States, 370 U.S. 294, 311–315, and *United Sta*
Philadelphia National Bank, 374 U.S. 321, 33
346–348. As originally enacted in 1914, Section
not apply to mergers as such, but only to acquisiti
stock or share capital. It was aimed primarily at
ing companies and similar devices through wh
corporation would obtain (often secretly) contro
competing corporation. While, as under present
the Department of Justice had concurrent jurisd
with the Commission to enforce Section 7, fro
outset it was the Commission that bore the pri
and virtually exclusive, enforcement responsib
It was a series of Commission cases decided by
Court which showed existing law to be entirely i
quate to deal with a greater problem than holding
panies—mergers or asset acquisitions which seri
harmed the structure of competition without
to the level of Sherman Act violations. It wa

[a] The reason for this is obscure. The legislative history
1914 Act sheds little light on how Congress intended th
enforcement jurisdiction it was creating to operate. As
nally proposed, the Clayton Act contained criminal pe
but made no provision for FTC enforcement; the latt
added when the criminal penalties were dropped. The f
the debates on this substitution was on the desirability
moving the criminal sanctions. See, *e.g.*, 51 Cong. Rec.
13849, 14200–14228, 15827–15829, 16057–16058, 16280
16317–16318.

Commission which pressed most vigorously for an amendment of the law to cover mergers. And it was the Commission which documented the need for such an amendment in an influential economic report upon the merger movement (*The Merger Movement—A Summary Report* (1948)).

In light of this background, it is not surprising that when in 1950 Congress decided to amend Section 7 as suggested by the Commission, the legislators thought primarily in terms of strengthening the Commission's powers, albeit the dual enforcement provisions of the old law were retained.[9] They clearly expected that the Commission would play a very important role in the enforcement of the amended law—had not the Assistant Attorney General of the Antitrust Division himself testified that the Commission had a major contribution to make to such enforcement?[10] There can

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[9] "The predominant focus of the hearings, debates, and committee reports was upon the powers of the FTC." *United States v. Philadelphia National Bank*, *supra*, pp. 346–347. For example, the Senate Report (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 3) stated that the purpose of the bill "is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly." See, also, H. Rep. No. 1191, 81st Cong., 1st Sess., p. 12; 95 Cong. Rec. 11487, 11490–11491, 11494, 11499, 11504; 96 Cong. Rec. 16433, 16437, 16451–16453.

[10] "If it [§ 7] is to have any significant effect for the future, it is essential that it be amended so that the Federal Trade Commission will be in a position to deal with the merger problem as it exists today." Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, p. 28 (remarks of Assistant Attorney General Bergson).

in short be no doubt that Congress intended th
dual jurisdiction of the Commission and the D
ment in the enforcement of the new law would
administered as to assure the Commission's eff
and not subordinate, participation.

2. For Congress' intent that the Trade Co
sion play an effective co-equal role in the admi
tion of the merger law to be realized, the Comm
must be able to assume primary responsibilit
merger enforcement in industries where it has s
knowledge and extensive experience. In dividi
sponsibilities, the Department of Justice and the
mission have respected this principle. A prin
ample is the dairy industry, in which the presen
arises. The competitive structure and behavi
this industry had been a focus of Commission
tion for many years prior to the enactment
merger law.[11] Mergers in the dairy industry
considered at length in the Commission's 1948
on the merger movement (*The Merger Move*
A Summary Report, supra, pp. 37–38). After
the Commission's concern intensified. A maj
port on mergers issued in 1955 highlighted the
industry,[12] and this was followed the next ye
a series of complaints challenging a large numb
acquisitions by the nation's leading dairy comp

[11] See, *e.g.*, *Report of the Federal Trade Commission*
Sale and Distribution of Milk, 75th Cong., 1st Sess., H
No. 95 (1937); *United Buyers Corp.*, 34 F.T.C. 87.

[12] F.T.C., *Report on Corporate Mergers and Acqu*
(1955), pp. 3, 4, 28–29, 57, 77–80, 89, 96–97, 128.

[13] *Foremost Dairies, Inc.*, 60 F.T.C. 944; *National Dairy*
ucts Corp., Trade Reg. Rep. (1961–1963 Transfer B
¶ 16,282; *The Borden Co.*, Trade Reg. Rep. (1963–1965 T

The culmination was the Commission's decision in *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17,244, where, on the express basis of its long experience with and extensive accumulated knowledge of many facets of the industry's competitive problems, the Commission set forth comprehensive guidelines governing the legality of certain dairy mergers. Indeed, Dean and Bowman themselves recognized the Commission's special role in dairy mergers, for it was to the Commission, not the Department of Justice, that they went to discuss the proposed acquisition.

If the Commission is to play an effective role in the scheme of dual enforcement, as Congress intended, surely it must continue to be primarily responsible for industries, like the dairy industry, where its experience and background uniquely equip it for expert and imaginative administration of Section 7. And since—as next we show—the availability to the Commission of preliminary relief in appropriate cases is essential to the Commission's merger enforcement program in such industries, it is clear that recognition of judicial power to afford such relief is fully compatible with, and indeed required by, the policies of the merger law.

B. THE COMMISSION CANNOT FULFILL ITS INTENDED ROLE IN SECTION 7 ENFORCEMENT IF DENIED THE POWER TO OBTAIN PRELIMINARY RELIEF IN APPROPRIATE CASES FROM THE COURTS OF APPEALS UNDER 28 U.S.C. 1651(a)

1. The Commission's duty to proceed against mergers that are injurious to competition would be mean-

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Binder), ¶ 16,869; *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17,244. *Foremost* and *Beatrice* (discussed in text) resulted in orders of divestiture after contested proceedings; the other two in consent orders of divestiture. The proceedings are described in the *Beatrice* decision.

ingless without the power to order divestiture
acquired properties. See *United States* v. *E*
Pont de Nemours & Co., 366 U.S. 316, 3
Hence, Section 11(b) of the Clayton Act (15
21(b)) expressly provides that if a violation
tion 7 is found, the agency "shall" order dive
But divestiture is not an effective remedy fo
legal merger unless it accomplishes the restora
the acquired firm as an effective and viable c
tor. See *Ekco Products Co.*, Trade Reg. Rep.
1965 Transfer Binder), ¶ 16,879, pp. 2190
(FTC), affirmed, 347 F. 2d 745 (C.A. 7). T
of an unlawful merger is that it removes as a
pendent factor a firm whose competition is im
to the competitive health of the market in
Normally, this vice cannot be cured unless
quired firm is recreated by the remedial order
cree in essentially the form in which it was ac

Between the issuance of a Commission merg
plaint and the entry of the final order of dive
there is an inevitable hiatus if the complaint
tested; for the respondent has a right to a c
trial-type hearing with the full panoply of
dural safeguards prescribed by the Adminis
Procedure Act. During this interval the resp
is free to take any action with respect to the a
properties, and sometimes the action a resp
takes prevents the entry of an effective orde
vestiture.[14] Vital plant and equipment may be

[14] The following are some examples drawn from the
sion's recent experience. *Ekco Products Co.*, Trade R
(1963–1965 Transfer Binder), ¶ 16,879, affirmed, 347 F

dismantled; essential intangible assets, such as trademarks or customer service routes, may be sold to third parties; changes in the industry or market may make

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(C.A. 7). (During Commission's proceedings the entire assets acquired from one firm were destroyed, and the operations of the other acquired firm were consolidated with those of Ekco. The Commission did not order divestiture of the assets already sold off, and its order requiring divestiture of the consolidated assets has not yet been carried out.) *Reynolds Metals Co.*, 56 F.T.C. 743, affirmed with modification of the order, 309 F. 2d 223 (C.A.D.C.). (The acquired firm's plant was abandoned and machinery was installed alongside the acquiring firm's machinery in a new plant. The court of appeals ruled that the Commission could not order divestiture of the plant acquired at Reynold's own expense. No purchaser has been found for the machinery of the acquired firm.) *Farm Journal, Inc.*, 53 F.T.C. 26. (During FTC hearings on the legality of *Farm Journal*'s acquisition of the only other national agricultural periodical, *Country Gentleman*, *Farm Journal* obtained control of the subscribers' and advertisers' lists of *Country Gentleman* and subscriptions were transferred to *Farm Journal* when *Country Gentleman* ceased to publish. No purchaser could be found for the subscriber and advertiser lists and the name, *Country Gentleman*.) *Foremost Dairies, Inc.*, 60 F.T.C. 944, order modified per stipulation, C.A. 5, No. 18,815, Feb. 24, 1965. (The operations of several dairies illegally acquired were thoroughly integrated with Foremost's operations prior to FTC's final decision so that divestiture of the assets of these firms was impossible.) *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17,244. (Commission ruled that 5 acquisitions violated Section 7, but the possibility of restoring one of these competitors, Dahl-Cro-Ma, as a going concern was doubtful since part of its facilities had been destroyed.) *Brillo Mfg. Co.*, Trade Reg. Rep. (1963–1965 Transfer Binder), ¶ 16,543. (Brillo's acquisition of the Williams Company was found to be in violation of § 7, but divestiture of the Williams plant was not required. Brillo had moved some of its own operations into the Williams plant and argued that due to overcapacity in the steel-wool industry sale of the Williams plant would be difficult. Divestiture of the plant was not ordered.)

sale of the assets commercially impossible; co
tial information vital to the acquired firm's c
tive position, such as trade secrets and technica
how, may be absorbed by the acquiring firm; or
erations of the acquired company may be s
pletely mingled with those of the acquiring co
that it is impossible to disentangle them.

Such problems have plagued the Commission
of its previous dairy merger cases,[15] and are str
presented by the present case. But for the i
of a stay by this Court, there would have been
remotest possibility that the Commission coul
tually restore Bowman as an effective compe
the dairy business by an order of divestitur
merger itself was consummated just a few hou
the court of appeals dissolved its temporary r
ing order, and at that point Dean acquired
Bowman's operating assets, including its pla
equipment, customer and supplier contacts an
the Bowman name itself, and various other t
and intangible assets. Bowman (which imme
after the closing became the Bowfund Corpo
retained more than 25 percent of its former
principally cash and marketable securities, p
proceeds of the sale, which it invested. Thus,
that was a going dairy operation ranking
second in the large Chicago milk market is no
ing more than an investment fund. And th
man assets in Dean's hands will not long reta
identity unless Dean is restrained by court

[15] *Foremost* and *Beatrice*. See n. 14, *supra*.

Dean does not deny that it will, if permitted, shortly consolidate the operations of the two companies, close various Bowman plants, sell off Bowman's milk routes, and absorb its food store accounts (Statement, *supra*, p. 6). Thus the possibility of effectively divesting Dean of the Bowman assets exists only because Mr. Justice Clark's order requires Dean to preserve the Bowman operation in the Chicago milk market. On this depends the Commission's ability to remedy a merger that is very probably illegal under Section 7.[16]

[16] Bowman was the first or second ranking seller of packaged milk in the Chicago area, with a market share of 16 percent. Dean ranked third or fourth in that market, with a market share of 7 percent. There appears to be no dispute that packaged milk is the relevant line of commerce and the Chicago area the relevant section of the country in which to test the competitive effects of the acquisition. As a result of the merger, Dean became the leading seller in the market by a substantial margin, and there has been a substantial increase in the concentration of an already highly concentrated market; the 42 percent of sales formerly accounted for by the first four sellers are now, as a result of the merger, controlled by the first three—and this in a market that has shown a sharp decline in the number of independent competitors. The foregoing facts clearly demonstrate *prima facie* illegality under the decisions of this Court. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *Continental Can Co.*, 378 U.S. 441. In rebuttal, Dean asserted below that Bowman is a "failing company" which its own management decided to remove from the market. But the facts alleged by Dean do not bring the case within the limited exception defined in *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, and *United States* v. *Diebold, Inc.*, 369 U.S. 654. For the failing-company rule to apply, a defendant must show, first, that the acquired company is in danger of imminent failure, and, second, that the acquiring company is the only available purchaser. Neither was shown here. Bowman was not facing

2. The Commission's inability effectively charge its duties in the enforcement of without preliminary relief is not cured by that Section 15 of the Clayton Act empower partment of Justice to obtain such relief brought by the Department in federal distri Any argument that the Department could equity proceeding, not to obtain a final decr protect a pending Commission proceedin foreclosed by the language of Section 15, parently contemplates that the district court Commission or a court of appeals reviewing mission's order—shall issue the final decree case.[17] Moreover, it would be a cumbersom dundant procedure for the Department to in the district court on the same cause, a same time, as the Commission was proceedi istratively.

Hence, if Section 1651(a) is inapplicable partment must be given complete responsibili merger cases, regardless of the type of merg

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bankruptcy, but had a $10 million surplus. And De show that an alternative purchaser—acquisition would not have such serious anti-competitive effe Dean-Bowman merger—was not available. On th the existence of at least one other potential pur shown by an affidavit of that firm. (R. 45–46.)

[17] Section 15 (App. C., *infra*, p. 51) provides t the parties complained of shall have been duly notif petition [*i.e.*, the Department's pleading commencing the court shall proceed, as soon as may be, to the h determination of the case; and pending such petitio *fore final decree*, the court may at any time make s rary restraining order or prohibition as shall be deer the premises." (Emphasis added.)

industry in which it occurs, where preliminary relief appears necessary. This result would be manifestly inconsistent with the concept of dual enforcement embodied in the merger law. As envisaged by Congress, the Commission—as a fully co-ordinate agency for the enforcement of the law—was to assume responsibility in those industries where it had special knowledge and experience; and, as the present case illustrates, the need for preliminary relief is as likely to arise in one of those industries as in one where the Department rather than the Commission has primary responsibility.

This Court has long recognized the dual enforcement responsibility of the two agencies and the unwisdom of arbitrarily dividing that responsibility. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 692–693; *U.S. Alkali Export Assn.* v. *United States*, 325 U.S. 196, 208; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 310, n. 13. Discussing this problem (albeit in a different context, that of the relationship between the antitrust laws and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45)), the Court in *Cement Institute, supra*, stated:

> All of the committee reports and the statements of those in charge of the Trade Commission reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not

> stopped in its incipient stages. * * * W
> conceive of no greater obstacle this Court
> create to the fulfillment of these congress
> purposes than to inject into every Trade
> mission proceeding brought under § 5 and
> every Sherman Act suit brought by the J
> Department a possible jurisdictional questi

Equally, an arbitrary jurisdictional distinction be
the two enforcement agencies, based solely
whether a pa lar merger case required pr
nary relief or not, would in fact exist if the
mission could not obtain injunctions to prevent
tration of its proceedings.

The practical effect of denying the Commi
any power to obtain preliminary relief in a m
case would be to require that responsibility for m
enforcement be allocated between the Commissio
the Department, not on the basis of which body
better equipped to handle a particular case o
basis of prior experience in the industry, but o
basis of which could obtain a preliminary injunct
a completely extraneous factor. A merger case i
dairy industry falls appropriately within the Co
sion's responsibility, in view of its long history
perience and concern with the competitive proble
this industry. Such a case should not have
shunted to the Department of Justice—the logica
sequence if respondents' position prevailed—m
because a preliminary injunction seems necessa
assure effective relief.

In sum, the policies behind the merger law
phatically support the Commission's attempt t
tain preliminary relief from the court of ap

under 28 U.S.C. 1651(a). It remains only to consider whether such exercise of judicial power is inconsistent with any other provision or policy of the law.

III. NOTHING IN THE HISTORY OR DESIGN OF THE CLAYTON ACT, OR ELSEWHERE, JUSTIFIES AN INFERENCE THAT CONGRESS INTENDED TO WITHDRAW THE COURTS OF APPEALS' ALL-WRITS POWERS IN RESPECT TO MERGER CASES BROUGHT BY THE FEDERAL TRADE COMMISSION

A. CONGRESS' FAILURE TO CONFER SUCH A POWER EXPRESSLY IS WITHOUT CONTROLLING SIGNIFICANCE

Although Congress never expressly provided that the courts of appeals shall have power to grant preliminary relief in Commission merger proceedings prior to the entry of the Commission's final order, this in itself is not dispositive. As we have seen (pp. 17–22, *supra*), the power here invoked is a part of the historic powers of the federal courts; now codified in 28 U.S.C. 1651(a), it dates back to the original Judiciary Act of 1789. 1 Stat. 81–82. In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, this Court rejected a contention similar to that advanced here—that a court of appeals could not issue a stay *pendente lite* in a Federal Communications Commission case because Congress had not expressly granted such power in the statutes defining the Commission's powers. The Court said, "denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." *Id.*, p. 11. For, the Court observed, "Unless Congress explicitly discloses such an intention we should not lightly attribute

to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest." *Id.*, p. 15. Congress has never "explicitly" disclosed any intention of withdrawing from the courts of appeals in Federal Trade Commission merger cases their historic power to protect the orderly processes of administrative enforcement and judicial review by the issuance of a preliminary injunction.

1. Respondents place special emphasis on the provision in Section 11(c) of the Clayton Act (15 U.S.C. 21(c)) that, after the Commission has issued its final order and a petition for review has been filed by the respondent in the court of appeals, that court may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." From this they argue that Congress intended the courts of appeals to have no jurisdiction to grant any ancillary relief until a petition for review has been filed. The argument is without merit.

In 1959, Congress simplified the procedures for enforcing Commission orders under the Clayton Act by amending Section 11 to make Commission orders final and effective unless respondent appealed, thereby eliminating the cumbersome enforcement procedures of the old law. 73 Stat. 243 (the "Finality Act"). The language in question referring to ancillary writs was added as part of this revision. Since the entire focus of the Finality Act was upon the

roblem of effective enforcement of Commission rders (see H. Rep. No. 580, 86th Cong., 1st Sess., p. ; S. Rep. No. 83, 86th Cong., 1st Sess., pp. 2–3), Congress, in making specific provision for ancillary relief, id not go beyond providing for the case where the Commission's order had already been entered. No nference can be drawn from this that Congress ntended thereby to limit the courts of appeals' Section 1651(a) powers *before* any order was entered. The problem of ancillary relief while the proceeding vas pending before the Commission—the problem of his case—was never alluded to in the deliberations on he Finality Act. To repeat, the purpose of the Act vas improved enforcement *after* the Commission ntered its order. Nor was there any consideration iven the special problems of merger enforcement. Moreover, the history of the ancillary-writs provision hat the Finality Act added to Section 11(c) makes lear that its adoption was intended purely as a precautionary measure.[18]

[18] The provision was taken without change or discussion from ection 3 of the Wheeler-Lea Amendments to the Federal rade Commission Act, 52 Stat. 111, 15 U.S.C. 45(c), adopted n 1938 to simplify enforcement procedures under the Trade Commission Act in the same manner later applied to Clayton ct orders by the Finality Act; and the language in Section 3 n turn originated in a letter from the Commission to the Chairman of the Senate Commerce Committee in which the Commission suggested that such a reference to ancillary writs be included in the statute to avoid any possible questions of the scope f Section 1651(a) as applied in the context of Commission proceedings under the Trade Commission Act. S. Rep. No. 221, 5th Cong., 1st Sess., p. 6.

2. Similarly, no inference of a congressiona termination on the question of this case can be d from the fact that in the Wheeler-Lea (food drug) provisions of the Federal Trade Comm Act and in other consumer-protection statute forced by the Commission, Congress made specifi vision for the Commission to obtain preliminar lief from federal district courts (see p. 23, *supra*). These statutes have nothing to do with ers. They deal with particular, narrow proble the field of deceptive food and drug advertising branding, the marketing of dangerously inflam wearing apparel, and the like. Congress deter that a district-court injunctive remedy was nec if the Commission was to deal effectively with specialized problems, without ever suggesting th Commission could not invoke the aid of a co appeals under 28 U.S.C. 1651(a) where necessa preserve the possibility of effective relief in a n case.[19]

3. Nor can any intent to foreclose that aver relief be inferred (as the Second Circuit in *F Trade Commission* v. *International Paper Co* F. 2d 372, thought) from the grant of power district courts to issue preliminary injunctions in brought by the Department of Justice under the ton Act (Section 15, 15 U.S.C. 25). This pro was formulated before there was any thought o ing the Federal Trade Commission concurrent diction to enforce the Clayton Act's prohibition stage in the passage of the Clayton Act when cr

[19] All the provisions in question were patterned after 13 of the Wheeler-Lea Amendments to the Federal

rather than administrative remedies were planned (see p. 24, n. 8, *supra*). Only later was an administrative remedy by the Federal Trade Commission and other agencies substituted for criminal sanctions. There is certainly no indication that Congress expected or desired that powers which the courts of appeals might otherwise have under the all-writs statute to grant preliminary relief in agency cases would be abrogated because it had previously decided to authorize the Department of Justice to seek such relief in cases brought by it in the district courts. On the contrary, as pointed out earlier, a system under which only the Department could obtain preliminary relief of any kind would be incompatible with the effective functioning of the dual-enforcement system established by Congress.

4. The court of appeals laid particular stress in its brief opinion upon the fact that the Commission on several occasions asked Congress for express authority to obtain preliminary relief in merger cases. See H.R. 9424 and S. 3341 and 3424, 84th Cong., 2d Sess., and H.R. 49 and 1574, 89th Cong., 1st Sess.

Commission Act, 52 Stat. 115, 15 U.S.C. 53, dealing with the advertising of food, drugs, cosmetics, and therapeutic devices. The reason for the provision appears to be twofold. There was concern that the Commission could not proceed swiftly enough under its existing authority to meet emergency situations involving life and health. 83 Cong. Rec. 398, 3293. And a similar power had been given the district courts in the enforcement of the Federal Food, Drug and Cosmetics Act (52 Stat. 1040, 1043, 21 U.S.C. 301, 332), a companion measure to Wheeler-Lea (approved a few months earlier) in that it gave the Federal Food and Drug Administration jurisdiction over labeling of the same products (foods, drugs, devices, and cosmetics) as to which Wheeler-Lea gave the Trade Commission jurisdiction over advertising.

The Commission's proposals embodied in the
however, differed radically from what is
here. None was a proposal to permit the c
appeals to grant preliminary injunctions.
volved either empowering the Commission
issue preliminary injunctive-type orders, or r
pre-merger notification by companies propo
merge coupled with provision for district-c
junction actions. At all events, these propos
never acted on by the Congress. And if in
them the Commission may have implied that it
have the power to seek preliminary relief in th
of appeals under 28 U.S.C. 1651(a), this ca
regarded as a "binding administrative interpr
of congressional intent. *United States* v. *E
Pont de Nemours & Co.*, 353 U.S. 586, 590; c
Yang Sung v. *McGrath*, 339 U.S. 33, 47.

B. THE COURT OF APPEALS IS AN APPROPRIATE FORUM FOR T
SOUGHT BY THE COMMISSION

The court of appeals is clearly a logical fo
preliminary relief in a Federal Trade Com
merger case. This is the court which has e
review jurisdiction of Commission orders
11(d), 15 U.S.C. 21(d)); which is famili
the laws administered by the Commission and
cedures applied by it; and which can enforce
sion orders directly through contempt pro
(Section 11(c), 15 U.S.C. 21(c)). Responden
ever, point to certain practical difficulties th
say a court of appeals must face in consider
plications for such preliminary relief. They
the factual disputes that may arise and the po

that trials may have to be conducted in some instances. But this is hardly a basis for assuming that Congress has stripped the courts of appeals of their "all writs" jurisdiction in such cases; and in any event the practical difficulties are exaggerated.

In the exercise of their general appellate functions, the courts of appeals every year consider and dispose of many applications for injunctions or stays pending appeal, each presenting the same general issues as here: whether the applicant can prove a substantial likelihood of success on the merits; the effect upon the chances of an adequate remedy if relief is granted or denied; whether the interests of unrepresented third parties may be adversely affected; and how the public interest may be affected by the grant or denial of relief.[20] These applications—a staple item of the courts of appeals' business—involve factual questions as difficult and as vigorously contested as any which arise from a merger proceeding. Yet the courts of appeals have managed to devise procedures for the just disposition of such applications, and to resolve the factual issues they present without evidentiary hearings. There is no reason to believe that applications in merger cases are less amenable to procedures for efficient judicial administration. As the present case illustrates, such factual issues as may arise in an applica-

[20] See, *e.g.*, *Virginia Petroleum Job. Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (C.A.D.C.); *Dunn* v. *Retail Clerks International Assn., Local 1529*, 299 F. 2d 873 (C.A. 6); *United States* v. *Lynd*, 301 F. 2d 818 (C.A. 5), certiorari denied, 371 U.S. 893.

tion for preliminary relief against a merger
dinarily be resolved on affidavits. The cou
peals, after all, is not asked to decide whe
merger is in fact illegal, but only whether th
interest requires maintaining the *status quo*
the Commission's determination of that questi
the courts of appeals will not be inundate
plications by the Commission. Such applicat
be made sparingly, because many merger c
proceed without preliminary relief and bec
Commission is mindful that the "all writs"
tion is an extraordinary power to be invoke
emergency situations.[21]

In sum, there is no danger that if the Co
is permitted to invoke the all-writs power
courts of appeals in merger cases the wor
those courts will be significantly increased
capacities strained; and they seem a
appropriate forum. Should experience pro
wise, Congress could readily provide for distr
rather than court of appeals proceedings
done in other areas.

CONCLUSION

The judgment of the court of appeals s
reversed and the case remanded for that cou

[21] In addition, the prospect of preliminary relief in
of appeals may be expected to encourage parties to C
merger cases to enter into voluntary agreements for m
separate operations which preserve the possibilit
scrambling the merged assets if the merger is final
be illegal.

cide the merits of the Commission's petition for a preliminary injunction.

Respectfully submitted.

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MARCH 1966.

APPENDIX A

Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

JANUARY 21, 1966

ON APPLICATION FOR PRELIMINARY INJUNCTION

MR. JUSTICE CLARK:

After consultation with the Court I have determined to issue an order staying further action consummating the merger pending the disposition of a petition for certiorari by the Federal Trade Commission, provided such petition is filed within ten days. A form of order effectuating this opinion may be submitted by the parties.

TOM C. CLARK,
Associate Justice of the Supreme Court.

JANUARY 21, 1966.

APPENDIX B

Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON APPLICATION FOR PRELIMINARY INJUNCTION

ORDER

Upon consideration of the application of the Federal Trade Commission and the opposition submitted by Dean Foods Company and Bowman Dairy Company,

IT IS ORDERED, that Dean Foods Company and Bowfund Corporation, formerly known as Bowman Dairy Company, shall refrain from making any material changes, directly or indirectly, with respect to the capital stock or corporate structure of Bowfund Corporation, or with respect to the assets purchased by Dean from Bowman, pursuant to their agreement of December 13, 1965, as amended, including the operations and policies affecting those assets (other than changes made in the ordinary course of business), pending the filing on or before January 31, 1966, by

the Commission and determination by this Court of a petition for a writ of certiorari, provided, however, that nothing contained herein shall bar the sale or disposition of any of the retail delivery routes in the Chicago area upon such terms and conditions, and to such purchasers, as may be acceptable to the Federal Trade Commission. In making such sales and dispositions, if the purchasers wish to have Dean supply them with milk or other dairy products, Dean shall attempt to persuade them to purchase such milk or products under the Bowman label and to supply such milk or products from a processing plant or plants formerly operated by Bowman. In no event shall Dean sell such milk or other dairy products under the Dean label.

In the event the petition for certiorari is denied, the effect of this order shall terminate immediately. In the event the petition is granted, this order shall continue in effect subject to further order of the Court.

TOM C. CLARK,
Associate Justice of the Supreme Court.

JANUARY 24, 1966.

APPENDIX C

Section 1651(a) of the Judicial Code, 28 U.S
1651(a), provides:

> (a) The Supreme Court and all courts
> tablished by Act of Congress may issue
> writs necessary or appropriate in aid of t
> respective jurisdictions and agreeable to
> usages and principles of law.

Section 7 of the Clayton Act, as amended, 15 U.S
18, provides in pertinent part:

> No corporation engaged in commerce s
> acquire, directly or indirectly, the whole
> any part of the stock or other share cap
> and no corporation subject to the jurisdic
> of the Federal Trade Commission shall acq
> the whole or any part of the assets of anot
> corporation engaged also in commerce, wh
> in any line of commerce in any section of
> country, the effect of such acquisition may
> substantially to lessen competition, or to t
> to create a monopoly.

Section 11 of the Clayton Act, as amended,
U.S.C. 21, provides in pertinent part:

> (a) Authority to enforce compliance w
> sections 13, 14, 18, and 19 of this title by
> persons respectively subject thereto is ve
> in the Interstate Commerce Commission wh
> applicable to common carriers subject to
> Interstate Commerce Act, as amended; in
> Federal Communications Commission wh
> applicable to common carriers engaged in w
> or radio communication or radio transmis
> of energy; in the Civil Aeronautics Bo

where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or as-

sets, held or rid itself of the directors chose
contrary to the provisions of sections 18 an
19 of this title, if any there be, in the manne
and within the time fixed by said order. * *

(c) Any person required by such order of th
commission or board to cease and desist fro
any such violation may obtain a review of suc
order in the court of appeals of the Unite
States for any circuit within which such viol
tion occurred or within which such perso
resides or carries on business, by filing in th
court, within sixty days after the date of th
service of such order, a written petition pra
ing that the order of the commission or boar
be set aside. * * * Upon such filing of the pet
tion the court shall have jurisdiction of the pr
ceeding and of the question determined there
concurrently with the commission or board unt
the filing of the record, and shall have pow
to make and enter a decree affirming, modif
ing, or setting aside the order of the commi
sion or board, and enforcing the same to th
extent that such order is affirmed, and to issu
such writs as are ancillary to its jurisdiction
are necessary in its judgment to prevent injur
to the public or to competitors pendente lit
The findings of the commission or board as t
the facts, if supported by substantial evidenc
shall be conclusive. To the extent that th
order of the commission or board is affirme
the court shall issue its own order commandi
obedience to the terms of such order of th
commission or board. * * *

Section 15 of the Clayton Act, as amended, 15 U.S.
25, provides:

The several district courts of the Unite
States are invested with jurisdiction to preve
and restrain violations of this Act, and it sha
be the duty of the several United States atto
neys, in their respective districts, under th
direction of the Attorney General, to institu

proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

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RESPONDENT'S

BRIEF

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No. 970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, *Petitioner*

v.

DEAN FOODS COMPANY AND
BOWMAN DAIRY COMPANY, *Respondents*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR RESPONDENT DEAN FOODS COMPANY

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H.R. Rep. No. 533, 63d Cong., 2d Sess. (1914) ... 30

H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949).. 38

H.R. Rep. No. 1889, 84th Cong., 2d Sess. (1956) .. 32

H.R. Rep. No. 486, 85th Cong., 1st Sess. (1957) ..32, 33

Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 15 (1956) 32, 33, 34, 37, 43

Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. (1956) 32, 33, 37, 43, 44, 45

Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 2 (1957) 24, 32, 44

Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958) 18, 21, 29, 32, 43, 44

Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. 5 (1961) 9, 17, 32, 34, 37, 44

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S. Rep. No. 1775, 81st Cong., 2d Sess. (1950).... 38

S. Rep. No. 2817, 84th Cong., 2d Sess. (1956)...32, 33

S. Rep. No. 132, 85th Cong., 1st Sess. (1957)...32, 33

S. Rep. No. 1808, 85th Cong., 2d Sess. (1958)... 43

S. Rep. No. 83, 86th Cong., 1st Sess. (1959).... 43

Miscellaneous:

Comment, 32 N.Y.U. L. Rev. (1957) 36

Dept. of Agriculture, MARKET SHARES IN FLUID MILK MARKETS (rev. ed. April, 1964) 7

Dixon, *Recent Developments in Federal Trade Commission Enforcement,* 18 A.B.A. Sect. Antitrust L. (1961) 35

Dixon, *Significant New Commission Developments,* 21 A.B.A. Sect. Antitrust L. (1962) 35

Henderson, THE FEDERAL TRADE COMMISSION (1924) 30

Kaysen & Turner, ANTITRUST POLICY (1959) 36

Kintner, *Developments in Congress of Special Interest to the Federal Trade Commission,* 15 A.B.A. Sect. Antitrust L. (1959) 35

Kintner, *Developments Under the Anti-Merger Act and Other Aspects of the Federal Trade Commission,* 5 Antitrust Bull. (1960) 35

PAGE

Kintner, *The Federal Trade Commission in 1960 —Apologia Pro Vita Nostra,* 1961 Antitrust Law Symposium 35

Kintner, *What's Ahead in Section 7 Enforcement,* 39 U. Det. L. J. (1961) 35

Kronstein, Miller and Schwartz, MODERN AMERICAN ANTITRUST LAW, A GUIDE TO ITS DOMESTIC AND FOREIGN APPLICATION (1958) 36

Martin, MERGERS AND THE CLAYTON ACT, (1959) 36

Massel, COMPETITION AND MONOPOLY, LEGAL AND ECONOMIC ISSUES (1962) 36

Comment, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act,* 40 N.Y.U. L. Rev. (1965) 36

Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act,* 79 Harv. L. Rev. (1965) 16, 29, 36, 48

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7 Moore, FED. PRACTICE 15

1958 Fed. Trade Comm. Ann. Rep. 36

1964 Fed. Trade Comm. Ann. Rep. 36

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 970

FEDERAL TRADE COMMISSION, *Petitioner*

v.

DEAN FOODS COMPANY AND
BOWMAN DAIRY COMPANY, *Respondents*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR RESPONDENT DEAN FOODS COMPANY

QUESTIONS PRESENTED

The Commission misconceives the question presented as turning solely upon the power of the court of appeals to issue an extraordinary writ in aid of the court's jurisdiction, pursuant to Section 1651(a) of the Judicial Code, 28 U.S.C. § 1651(a). More properly, the question is whether the Commission, as a creature of statute, has standing to seek a preliminary injunction pending completion of its administrative hearings when Congress (1) has repeatedly refused to grant it that power and (2) has expressly limited the jurisdiction of the courts of appeals to grant relief *pendente lite* to cases where the Commission's hearings have been completed and a record has been filed for review.

In resolving this question, it is also appropriate
sider whether assumption by the courts of appeal
novel and intrusive task of conducting evidentiary h
in connection with applications for pre-hearing r
the Commission and other administrative agencie
be consonant with sound principles of judicial adm
tion and procedural due process.

Finally, quite apart from the Commission's
standing to proceed, a question is presented as to
this court's stay order should be vacated and the
for certiorari dismissed for the reasons, first, t
Commission's *prima facie* case has been completely
mined by the uncontroverted facts of record, lea
likelihood that it could prevail on the merits and,
that the stay is causing respondent Dean irre
injury.

STATEMENT

The Commission's Statement of the case would l
impression: (1) that Bowman, prior to the sale
operating assets to Dean, was essentially a sou
profitable company "despite some losses from it
operations" (Brief For The Federal Trade Com
hereafter "C.B.", 3); (2) that Dean, too, enjoyed a
able and growing" place in the dairy industry,
standing its "alleged" fear that "it might presen
its principal supermarket account" (C.B. 4, 6);
the very survival of smaller dairies in "the Chica
market, already highly concentrated" is threatened
acquisition (C.B. 3); (4) that respondents ente
their Purchase Agreement defying advice from th
mission's Staff that "the acquisition would raise
questions under the antitrust laws" (C.B. 3, 4);
that Dean, once permitted to proceed by the cour
peals, refused to "execute a further extension of the
date", and hastened to close the transaction before
peal could be perfected to this Court (C.B. 8).
point, the facts are quite to the contrary.

1. At the time Bowman reached its decision to sell its dairy operations to Dean, its financial and operating plight was an extreme one. In the Chicago metropolitan market, which the Commission states is "the relevant section of the country in which to test the competitive effects of the acquisition" (C.B. 31, n. 16), the following table shows that Bowman's sales had declined sharply during the preceding five years, while its operating losses had mounted at an alarming rate (R. 60):

	Sales	Operating Losses
1960	$56,796,962	($ 197,459)
1961	53,089,958	(678,127)
1962	52,628,675	(618,315)
1963	48,993,885	(617,841)
1964	46,596,008	(1,571,989)

Although the results outside Chicago had been less disastrous, Bowman had nonetheless reported a company-wide operating loss of $700,000 in 1964 (R. 59).[1]

Despite vigorous management efforts at rehabilitation during recent years, all indications pointed to a further deterioration in Bowman's already straitened condition. The continuing consumer trend toward store purchasing of milk had resulted in calamitous sales losses in home delivery, to which Bowman had long been heavily committed, particularly in Chicago. Its routes had dropped from a high of 2,200 to less than 500 (R. 59-61). Moreover, because Bowman had for so many years bent its efforts toward protecting its heavy investment in home delivery distribution, the retail store customers which it had secured were predominantly the less attractive, small volume ac-

1. The *de minimus* "overall profit" alluded to by the Commission (C.B. 3) was due solely to non-recurring income derived from the liquidation of plant, equipment and other assets and to non-operating profits from outside investments in marketable securities (R. 64).

counts (R. 62). Lacking a large and growing superm clientele, Bowman found itself unable to dispose home delivery business and still maintain enough v at the Chicago plant to secure minimal operating effic Indeed, despite the completion of a million dollar mo zation program at the Chicago plant in 1964—the plant where significant capital improvements had made—continued losses were anticipated. Outside Ch Bowman's plants were uniformly old, overcrowde in need of modernization (R. 62-64).

Frustrated in their efforts to devise any internal tion to the company's problems and confronted wi prospect of further sales declines and mounting ope losses, Bowman's management and shareholders con that an effort had to be made to find a buyer for the pany's dairy business and, in the event none was ava to effect a piecemeal self-liquidation as rapidly as po (R. 65, 66, 73-76).[2] Though the Commission assert "there was no evidence Bowman had made any eff obtain other purchasers" (C.B. 3), the record in fac closes that Bowman approached three dairy comp besides Dean, the only ones it reasonably believed be interested in making an offer (R. 66). Only Dea

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2. Bowman's stock was closely held, with nearly a third hands of two elderly widows, one of whom had recently die Senior Trust Officer for the Northern Trust Company of C which acts as Co-Executor, stated that it had "carefully an pendently evaluated [the] future income requirements" estate and had "concluded that the continued operation o man's dairy business on its present basis was unwarrante that these operations should preferably be sold as a packa if necessary, liquidated on a piecemeal basis and the fund erated from such a sale or liquidation re-invested elsewhere 73).

pressed any interest, however, and it was only willing to pay less than two-thirds of Bowman's net worth (R. 66).[3]

2. Although Dean, unlike Bowman, had shown a modest growth in recent years, mostly through entry into other food lines, both its sales and profits had declined in 1964 and, as a medium-sized regional dairy, it was dwarfed by the giant national firms. (Compare R. 68-70 with *Beatrice Foods Co.*, Trade Reg. Rep., 1963-1965 Transfer Binder, ¶17,244 at p. 22,325 (FTC 1965)). Moreover, over three-quarters of its Chicago business was with a single customer, Jewel Tea Company, which had recently disclosed its plans, conforming to a trend by other corporate and cooperative food chains, to open its own dairy plant and to terminate its supply arrangements with Dean (R. 70).[4] With the loss of the Jewel busines, Dean would have been forced to close several plants and others would have been left with substantial over-capacity (R. 70). It was to counter this severe threat to the continuation of its operations in the Chicago market that Dean decided to commit a sum equal to nearly its entire net worth to the purchase of Bowman's assets. Dean hoped that by disposing of Bowman's losing home delivery routes to smaller dairies who could operate them at a profit and by effecting cost-cutting consolidations of Dean and Bowman operations, it

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3. The Commission's claim that "at least one other dairy had an interest in acquiring Bowman and continuing its dairy operations" (C.B. 3) was thoroughly discredited before the court of appeals by evidence that this company had knowledge of Bowman's plans to sell nearly a month in advance of the contract with Dean, but gave no indication of its purported interest to anyone at Bowman at that time (R. 45).

4. For the current status of the Jewel account, see the confidential letter previously lodged with the Clerk.

could salvage enough Bowman and Dean business cago to permit a profitable operation (R. 70-71).

3. The Commission's Statement fails to disc despite a canvass of the Chicago market it found try witness to support in any way its position be court of appeals that competition would be adve fected by the acquisition. Nor does the Co disclose that respondents filed the affidavits of th tive Secretary of the Associated Milk Dealers of which represents substantially all dairies in the the General Manager of the Pure Milk Associati operative composed of dairy farmers supplying t part of the milk to the area, and the Chairman o land Co-Operative, a large independent retail gr operative, all of whom agreed that the acquisiti have no such effect (R.80-84). They established, *any contradiction by the Commission*, (a) that " farmers will not be affected by Bowman's sale of operations to Dean because prices to farmers a mined through a Federal order and a superpool" (b) that there is "no likelihood that Dean's acqui Bowman's dairy operations will give it the mark to charge other than competitive prices . . . [sin are many alternative milk suppliers" to whom c "could turn should this unlikely event occur" (c) that there are presently "a large number of a and vigorous dairies in the Chicago market and petition has been increasing rather than decreas 81); (d) that "if independent grocers . . . are t competitive with . . . vertically integrated chains their own dairies], they must be able to purch milk from efficient independent dairy compan Dean's purchase will enable it "to remain comp the dairy industry and to supply independent gro milk at the lowest possible prices" (R. 84); (e)

that the acquisition can have "nc conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally" (R. 81, 82-83, 84). In fact, Dean's plan to sell the former Bowman home delivery routes, which accounted for over 50% of Bowman's business in the Chicago area, to smaller dairies "will significantly strengthen the competitive vitality of these firms by giving them an opportunity to reduce their distribution and processing costs and increase their operating efficiency" (R. 81).

Also uncontradicted was the fact that (a) after Dean's sale of the former Bowman home delivery routes, which has already been substantially accomplished under the terms of this Court's stay, and (b) after the imminent loss of the Jewel account, Dean will have a market share in Chicago which is less than half the 23% market share allegedly accounted for by Dean and Bowman before the acquisition and well below the 16% which had been enjoyed by Bowman alone (R. 71). As a consequence, the acquisition will contribute to the trend toward declining concentration in the Chicago market, already evident in figures published by the Department of Agriculture, which also showed that of the 59 milk marketing areas for which the Department published statistics, Chicago was among the five least concentrated. Dept. of Agriculture, MARKET SHARES IN FLUID MILK MARKETS (rev. ed. April, 1964).

4. Six weeks prior to the formal execution of their Purchase Agreement, respondents, *on their own initiative,* brought to the attention of the Commission's Staff all of the material facts relating to the transaction which were later set forth in their affidavits filed with the court of appeals and to which reference is made in this Statement. This was done so that the Commission could have an

opportunity fully to investigate the proposed acquisition (R. 146-148). The Staff was then invited to suggest *any* modifications in the transaction short of its complete abandonment—and not merely the "divestiture of Bowman's retail home delivery milk routes", as the Commission suggests (C.B. 4)—which would make it acceptable to the Commission (R. 149). The Commission, however, declined to pursue discussions of any alternatives and, prefering to use the transaction as a "test case" with regard to its authority to proceed in the court of appeals, filed its administrative complaint and thereafter its emergency petition to the Seventh Circuit (R. 92, 149).

5. On January 19, 1966, the court of appeals, after oral argument and extensive briefs on both the merits and the jurisdictional issue, denied the Commission's petition on the ground that "the Commission did not have authority to institute this proceeding in this court" (R. 154). Further, the court vacated its previous order, which had stayed the closing until five days after entry of its judgment, thereby granting the respondents the right to close. When Bowman refused to extend the closing and tendered performance (R. 157), Dean had no alternative but to consummate the transaction, since the very condition on Dean's performance quoted by the Commission (C.B. 7, 8) reveals that it no longer applied following the lifting of the stay by the court of appeals.

SUMMARY OF ARGUMENT

On April 28, 1961, the Honorable Paul Rand Dixon, Chairman of the Federal Trade Commission, appeared before the House Antitrust Subcommittee to testify in support of legislation which would have granted the Commission the power to secure temporary injunctive relief in merger cases pending completion of the Commission's ad-

ministrative hearings. During the course of his testimony, the Chairman assured the Subcommittee that such legislation was of utmost importance since "the Commission presently . . . has no authority to prevent mergers or the mingling of assets after mergers have been consummated." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess. 85, 86 (1961). Calling particular attention to the decisions in *Federal Trade Commission* v. *International Paper Co.,* 241 F.2d 372 (2d Cir. 1956), and *Federal Trade Commission* v. *Farm Journal, Inc.* (3d Cir. 1955, unreported), which had denied the Commission authority "to preserve the status quo" under the "all writs" statute, the Chairman concluded: "*It is clear that the Commission has no such authority.*"[5] (*Id.* at 87.)

The Chairman could hardly have been faulted for his conclusion. The most exhaustive search of the antitrust statutes would have turned up no provision authorizing the Commission to seek pre-hearing relief in the merger field. The three preceding Congresses had rejected no less than fifteen amendatory proposals to grant the Commission that power, and the three succeeding ones were to deny another twenty-two. As the Chairman himself noted, two different Circuits had found the Commission's application to the courts of appeals for such relief to be without merit, and one of his predecessors had conceded to Congress that those decisions were correct. Finally, resort to the commentators would have disclosed that all were in accord with the Chairman's view: "It is clear that the Commission has no such authority."

Save for the Commission's expedient desire now to reverse its field, this respondent is aware of no change in

5. Emphasis has been added throughout this brief.

the controlling statutes or judicial precedents which wo
render either the Chairman's conclusion or the reas
supporting it less compelling today than they were in 19
On the contrary, the untoward results which would fl
from a transformation of the courts of appeals into e
dentiary tribunals for the hearing of preliminary inju
tion petitions suggest the impropriety of the Commissio
request that this Court overturn the deliberate refusal
Congress to grant the Commission pre-hearing relief.

I.

The courts of appeals are not only ill-equipped to assu
the unorthodox role of holding lengthy preliminary inju
tion hearings upon application by federal administrati
agencies, which the Commission seeks to impose upon th
but the assumption of this added burden would disru
the orderly disposition of their already over-taxed c
endars. The Commission's efforts to temper the radi
import of its proposal with the suggestion that such he
ings could be confined to affidavits alone, conflicts both w
settled preliminary injunction procedures and with t
actual experience of the district courts in merger ca
brought by the Department of Justice. There the tende
has been for the preliminary hearing, because it often lea
to an abandonment of the transaction if an injunction
sues, to take on all the essentials of a trial on the meri
Additionally, the procedure which the Commission asks t
Court to sanction presents a serious conflict with tra
tional principles of administrative justice. The Comm
sion's representation at the pre-hearing stage that
will probably find the respondents guilty of an antitr
violation—a representation which has already been ma
here and which must inevitably be made in future reque
for preliminary relief as well—threatens its ability fai
to hear the case on the merits. Since effective enforcem

of the antitrust laws can be accomplished, as it has been for over five decades, by a district court proceeding brought by the Department of Justice in the Commission's stead, no reason exists for the adoption of a procedure which is subject to such important procedural and substantive objections.

II.

Although the Commission is correct in suggesting that Congress contemplated a scheme of "dual enforcement" for many (though far from all) provisions of the antitrust laws, it has lost sight of the fact that Congress did not intend that the *methods* of enforcement to be employed by the Commission and the Department of Justice should be identical. On the contrary, the sole grant of authority to proceed before the courts for injunctive relief was to the Department of Justice. Congress limited the Commission's role to an administrative one. Indeed, the Commission was not even authorized to issue a complaint—as it has improperly done in this case—against a threatened violation of the antitrust laws.

Congress has, moreover, repeatedly refused to supply by amendment the authority which is so patently lacking in the existing statutory scheme. The prodigious volume of these amendatory proposals—thirty-seven during the past dozen years alone—and the extensive consideration given to them by Congress argue convincingly that they cannot be dismissed as mere "legislative inaction". Especially is this so since they have been accompanied by explicit and repeated recognition on the part of Congress, their sponsors and the Commission, itself, that absent such a specific grant of authority to the Commission, it has no power to obtain preliminary injunctive relief, either from the courts of appeals or elsewhere.

III.

Consistent with the Congressional design to confi
Commission to an administrative role in merger cas
with the unwisdom of converting the courts of appea
evidentiary tribunals, Congress has explicitly provide
the jurisdiction of those courts, not only with resp
review of Commission cease and desist orders, bu
with respect to relief *pendente lite*, shall attach only
the filing of a petition for review following a full ad
trative hearing. Significantly, when the provision r
ing relief *pendente lite* was added to the Clayton Act
Finality Act amendments in 1959, Congress chose exp
to retain this jurisdictional prerequisite, notwithst
the fact that the very committee which reported ou
amendatory legislation also had under considerati
the same time the Commission's request for pre-h
relief and was well aware that the Commission's
to secure such relief under the "all writs" statute ha
recently been rejected both by the Second and Thir
cuits. The decisions of this Court amply support th
clusion of those courts and of the court below that
Congress has so plainly manifested its intention
specific provisions of the antitrust laws that the
of appeals should not have jurisdiction to issue pr
nary relief, the generalized provisions of the "all
statute cannot be used to circumvent that Congres
limitation.

IV.

The Commission brought this case, and in turn ob
a stay, on the pretense that the sale of Bowman's ope
assets to Dean eliminated Bowman as a "viable compe
thereby increasing concentration in the Chicago
market, and that preliminary relief was essent
Bowman was to be reconstituted as a "going con

Since, however, the facts actually adduced before the court of appeals completely refuted these contentions, there is no basis for granting preliminary relief in any event, and the jurisdictional question posed by the Commission is purely hypothetical.

The unchallenged statements of Bowman's shareholders and management establish that the sale to Dean had no bearing on Bowman's decision to abandon its dairy business; the company's operating reverses had reached such proportions prior to the sale that its owners would have liquidated its dairy business in any event. Equally indisputable is the fact that Dean's disposition of the former Bowman home delivery routes (which was expressly excepted from this Court's stay), together with the imminent loss of Dean's largest customer in the Chicago area, will leave it with a market share only slightly larger than it had before the acquisition and well below half of that which was formerly accounted for by Dean and Bowman together. Finally, now that the transaction has been consummated and the home delivery routes are all but disposed of, there is not the remotest possibility of putting Bowman back in the dairy business; indeed, its owners would immediately effect a piecemeal self-liquidation if this were done in order to escape the crushing burden of the company's operating losses.

While the Seventh Circuit did not reach the merits of the Commission's petition, it is well settled that a reviewing court may affirm on any ground which will sustain the judgment below. Since the uncontroverted facts of record disclose no probability that the Commission could sustain its case on the merits, and any extension of the stay imposed by this Court will cause serious injury to Dean, we believe the writ of certiorari should be dismissed as improvidently granted or, in the alternative, that the judgment below should be affirmed.

ARGUMENT

I. SOUND PRINCIPLES OF JUDICIAL ADMINIS TION AND PROCEDURAL DUE PROCESS TATE THAT THE COURTS OF APPEALS SH NOT ASSUME THE CONDUCT OF PRELIMI INJUNCTION PROCEEDINGS.

The Commission rightly asserts that "this case pr a procedural question of major practical importa the administration of Section 7 of the amended C Act." (C.B. 13). That question, however, transcen Commission's jealous concern for securing a "co-equ forcement role" in merger cases. (C.B. 24). The rea is whether effective judicial administration, not only antitrust laws, but of all cases assigned to the cou appeals under the Federal system, is served by thr upon those courts the unorthodox and burdensome t sitting as trial courts for the conduct of prelimina junction proceedings, when Congress has provided a adequate alternative enforcement procedure throu application to the district courts by the Departm Justice.

A. The courts of appeals are ill-equipped to und the added burden of lengthy preliminary inju hearings.

Despite the Commission's effort to mask its extr nary request for preliminary injunctive relief as "a item of the courts of appeals' business" (C.B. 41), the mission cannot hide the far-reaching implications proposal that those courts undertake the type of evi ary hearings and fact-finding role which Congres lodged only in the district courts. What the Comm asks is no less than a revolutionary departure fro traditional appellate status of the courts of appeal

The instances cited by the Commission (C.B. 41, n. 20) of applications to the courts of appeals for a stay pending appeal from a ruling by the district court are scarcely in point here. It is one thing to pass upon an application for a stay *following a full hearing below;* it is quite another to conduct a preliminary injunction hearing in the first instance. In the former it may be appropriate to "resolve the factual issues" on affidavits and "without evidentiary hearings" as the Commission suggests (C.B. 41). But as pointed out by one of the very cases upon which the Commission relies, *Dunn* v. *Retail Clerks International Assn., Local 1529,* 299 F.2d 873, 874 (6th Cir. 1962), "the District Court could not grant an injunction without hearing the evidence" and the parties would be entitled to the same type of hearing were the courts of appeals to assume a similar role. "On the hearing for the [preliminary] injunction an adequate presentation of the facts is necessary. While the pleadings, if verified, and other affidavits are of service in determining the merits, the court should normally be reluctant to decide controverted factual issues in favor of the movant on the basis of affidavits alone." 7 Moore, FEDERAL PRACTICE ¶65.04, at 1638-39, and cases cited.

Certainly the experience of the district courts with preliminary injunction proceedings in merger cases brought by the Department of Justice affords no basis for concluding that they could be restricted to the perfunctory hearings envisaged by the Commission. On the contrary, the tendency has been for the preliminary hearing to partake of "all of the essentials of a trial on the merits." *United States* v. *FMC Corp.,* 218 F. Supp. 817, 823 (N.D. Cal. 1963), *appeal dismissed,* 321 F.2d 534 (9th Cir. 1963); *application for preliminary injunction denied,* 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers). This has been at-

tributable as much to the Government as to the defendants, since recent indications "seem to suggest a government attempt to set forth all available evidence at the hearing." Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 400 (1965).

For example, in *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa. 1963), *aff'd.* 320 F.2d 509 (3d Cir. 1963), the factual aspects of the government's claim for injunctive relief were so exhaustively documented and argued that the hearing lasted five days and the transcript ran to eight hundred pages. In *United States* v. *Penick & Ford, Ltd.*, 242 F. Supp. 518 (D.N.J. 1965), the government called six witnesses just to testify on the alleged impact of reciprocity in the starch industry. And even more recently, in *United States* v. *Pennzoil Co.*, 1966 Trade Cas. 81,958 (W.D. Pa. 1965), the hearing lasted six court days as every aspect of the proposed merger was extensively gone into by way of testimony and exhibit.

The development of the preliminary injunction hearing into an almost full dress trial is due in no small measure to the fact that it is often not merely the preliminary, but the *only* hearing in the case. Thus, in *United States* v. *Pennzoil, supra,* the government won a preliminary injunction on December 30, 1965, and by February 9, 1966, the defendants had abandoned the merger. The result was the same in *United States* v. *Ingersoll-Rand Co., supra; United States* v. *Chrysler Corp.*, 232 F. Supp. 651 (D.N.J. 1964); and *United States* v. *Parents Magazine Enterprises, Inc.*, 1962 Trade Cas. 76,757 (N.D. Ill. 1962), 1963 Trade Cas. 77,628 (N.D. Ill. 1963). Compare *United States* v. *Gimbel Brothers, Inc.*, 202 F. Supp. 779 (E.D. Wis. 1962), where the Department dropped its case following denial of preliminary relief.

Just as it cannot be assumed that the preliminary hearings will lend themselves to disposition on affidavits alone, it cannot be assumed that they will be limited solely to merger cases. Though the Commission suggests that similar relief will not be *"necessarily* available to other administrative agencies or with respect to other provisions of the Clayton Act" (C.B. 16), it is difficult to understand why such a gratuitous restriction should be adhered to if the Commission's Section 1651(a) theory has any merit here. In fact, the Commission has seemingly overlooked that even the instant case is grounded on the open-ended provisions of Section 5 of the Federal Trade Commission Act as well as Section 7 of the Clayton Act (R. 3, 7). Moreover, Chairman Dixon, during testimony before the House Antitrust Subcommittee, argued that preliminary relief is "necessary not only in merger cases but in all Commission actions in which cease and desist orders are issued." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess., ser. 5, at 93 (1961). As for the Commission's suggestion that its applications to the courts of appeals will be made "sparingly" (C.B. 42), there seems some inconsistency with its assertion elsewhere that the problem is of pressing importance and that a suit in its stead by the Department of Justice on these infrequent occasions is inadequate (C.B. 32-35).

It can hardly be disputed that the courts of appeals are singularly unprepared to assume the unprecedented task with which the Commission seeks to burden them. They have no fact-finding authority in proceedings brought by the Commission. *Federal Trade Commission* v. *Interna-*

tional Paper Co., 241 F.2d 372, 373 (2d Cir. 1956). No statute or rule governs venue or service of process. Compare 15 U.S.C. § 22.[6] Nor are the courts of appeals possessed of the sweeping subpoena power granted to the district courts in antitrust actions. Compare 15 U.S.C. §23. Most important, they have neither rules nor developed procedures for the holding of evidentiary hearings or the administration of pre-hearing discovery through depositions, interrogatories and motions to produce. Even Commission Chairman Dixon, while serving as Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, when informed by former Chairman Gwynne of the Commission's prior efforts to secure injunctive relief from the courts of appeals, remarked, "You were in the circuit court there, and ordinarily the circuit court is not a trial court." *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee of the Judiciary*, 85th Cong., 2d Sess., at 45 (1958).

The prospect of imposing lengthy and complex preliminary injunction hearings upon the courts of appeals is especially ill-considered in view of their already crowded calendars. As the 1965 Annual Report of the Director of the Administrative Office of the United States Courts points out: "The United States courts of appeals and the United States district courts during the fiscal year 1965 were again unable to cope with the large volume of new judicial business. As a result cases pending in the courts at the end

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6. Although Section 11(c) of the Clayton Act provides that the respondent shall have the right to obtain review "in any circuit within which such violation occurred or within which such person resides or carries on business", it makes no mention of proceedings instituted by the Commission. 15 U.S.C. §21(c). See discussion at p. 22, *infra*.

of the year mounted to an all-time high." (p. I-1) With specific reference to the courts of appeals, the Administrative Office stated: "In the United States courts of appeals, 6,766 cases were docketed in 1965, an increase of 12 percent as compared with the 6,023 cases docketed during 1964. There were 5,771 cases disposed of during the year, 71 more than in 1964, but almost 1,000 less than the number of appeals docketed. Appeals pending on June 30, 1965 thus climbed to a record 4,775. In four years the volume of appeals docketed in the courts of appeals has risen more than 50 percent; pending cases have doubled." (p. I-2). To add to this workload the conduct of preliminary hearings on an emergency basis wherever an administrative agency seeks to preserve the *status quo* pending the completion of its hearings would clearly disrupt the courts' orderly disposition of their regular dockets.

B. The Commission's adversary role at the preliminary stage of this proceeding threatens its ability fairly to judge the case on the merits.

In addition to the conflict with the orderly administration of justice which the Commission's proposal raises for the courts of appeals, it presents a serious conflict with accepted principles of administrative justice insofar as respondents are concerned. In this case—as it necessarily must in future cases—the Commission has so committed itself to the respondents' guilt during the preliminary hearings before the court of appeals, that its ability subsequently to "act with entire impartiality" during the hearings on the merits is rendered suspect. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964); *Pillsbury Co.* v. *Federal Trade Commission*, 1966 Trade Cas. 81,891 (5th Cir. 1966).

The Commission has represented in its Emergency Petition that "it is probable that the Federal Trade Commission will enter an order finding a violation" (R. 4); its brief to the court of appeals asserted that "the conclusion is inescapable that the antitrust laws have been violated," (p. 11); its petition for certiorari maintained that it "appears likely [that] the Dean-Bowman merger [will be] found to violate Section 7," (p. 10); and its brief to this court concludes that the merger "is very probably illegal under Section 7." (C.B. 31).

Whether the Commission has thus disqualified itself from passing upon the Dean-Bowman acquisition is not presently at issue. What is at issue is acquiescence in a procedure which must inescapably force the Commission into public representations that the respondents will, at the very least, "probably" be found to have violated the antitrust laws. And this prior to any hearing either before the examiner or the full Commission.

Such derogation from administrative impartiality has been consistently inveighed against, both with respect to the Trade Commission and other agencies. See *e.g. Texaco, Inc.* v. *Federal Trade Commission, supra, Pillsbury Co.* v. *Federal Trade Commission, supra; Amos Treat & Co.* v. *S.E.C.*, 306 F. 2d 260 (D.C. Cir. 1962); and *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 231 F. Supp. 422 (N.D. Ill. 1964). Particularly pertinent here is *Gilligan, Will & Co.* v. *S.E.C.*, 267 F. 2d 461 (2d Cir. 1959), where the court severely criticized the propriety of an SEC press release, issued in advance of hearing, which had stated that the respondents had violated Section 5 of the Securities Act of 1933. "Apart from ¶5 [of the Administrative Procedure Act] and the restrictions it may impose, the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from

which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." 267 F. 2d at 468-9.[7]

Commission Chairman Dixon himself has recognized that, were the Commission given authority to seek preliminary relief, it would "then become both an administrative agency, and we might say, a prosecuting agency in that respect." *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess., at 51 (1958). This problem is, of course, not present with respect to requests for preliminary relief by the Department of Justice, an agency not burdened with the responsibility of judicial determination.[8] It is apparent, therefore, that in its drive to gain "co-equal" status with the Department, the Commission asks this Court to increase its executive efficacy at the sacrifice of its judicial impartiality.

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7. This Court need not be concerned, as it was in *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948), that disqualification of the Commission in the instant type of proceeding will bar all enforcement activity, since the Department of Justice is well equipped to secure from the district courts the identical relief requested by the Commission (see pp. 22-26, *infra*).

8. Nor is it present in those limited instances where Congress has seen fit to grant the Commission, rather than the Department, the authority to seek preliminary injunctions from the district courts, since the Commission is required to show only that it has "reason to believe" the law is being violated in those instances. See Section 13 of the Federal Trade Commission Act, 15 U.S.C. §53; Section 7(b) of the Wool Products Labeling Act of 1939, 15 U.S.C. §68e(b); Section 9(b) of the Fur Products Labeling Act, 15 U.S.C. §69g(b); Section 6(a) of the Flammable Fabrics Act, 15 U.S.C. §1195(a); Section 8 of the Textile Fiber Products Identification Act, 15 U.S.C. §70f.

In addition, the procedure which the Commission asks this Court to sanction effectively destroys the right which Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act confer on the respondent to choose the court of appeals in which it will seek review of a Commission cease and desist order. Both statutes provide that the respondent may obtain review in "any circuit within which such violation occurred or within which such person resides or carries on business." 15 U.S.C. §§21(c), 45(c). Here, for example, those provisions would permit the respondent to select from among any one of three Circuits. Yet the Commission, by bringing its emergency petition in the Seventh Circut, has, as a practical matter, settled eventual review in that court in contravention of the express intent of Congress that the decision should be the respondent's.

C. No reason exists for adoption of the Commission's radical procedure, since effective enforcement of the antitrust laws can be accomplished by preliminary injunction proceedings brought by the Department of Justice before the district courts.

In contrast to the important procedural and substantive objections which may be made to the Commission's proposal, the reasons "of policy" which it has adduced for its adoption (C.B. 22, *et seq.*) do not withstand analysis. The Commission is met at each turn with the undeniable fact that effective enforcement of the antitrust laws can be obtained, as it has been for over five decades, by a district court proceeding brought by the Department of Justice in the Commission's stead.

The Commission's lengthy disquisition upon the need for injunctive relief in merger cases (C.B. 27-31) misses the

point. The Commission is compelled to concede "that Section 15 of the Clayton Act empowers the Department of Justice to obtain such relief" in the very type of cases to which it alludes (C.B. 32). Consequently, denial of the relief requested by the Commission here does not leave the Government agencies without a remedy.[9]

Nor can the Commission seriously contend that the Department is ill-equipped to bring suit in merger cases. Though the Commission would like to believe that "from the outset it was the Commision that bore the primary, and virtually exclusive, enforcement responsibility" for Section 7 (C.B. 24), it can hardly be denied that the Department, both quantitatively and qualitatively, has had an important impact on merger enforcement. In fact, all of the significant merger cases before this Court in recent years were instituted by the Department. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962); *United States* v. *E. I. DuPont de Nemours*, 353 U.S. 586 (1957); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) —to mention only those cases which the Commission itself cites.

The Commission is also in no position to dispute the Department's expertise in the dairy industry. The Department, as much as the Commission, has had "a long history of experience and concern with the competitive problems

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9. Furthermore, the Commission's contention (C.B. 27, 28) that effective merger enforcement is "meaningless without the power to order divestiture" conflicts with one of its most recent merger decisions, *National Tea Co.*, Dkt. 7453 (March 4, 1966), where, despite a finding of illegality, it concluded that "a lesser remedy will suffice" (p. 16).

of this industry" (C.B. 34). See, *e.g., Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951); *United States* v. *Borden Co.,* 347 U.S. 514 (1954); *United States* v. *National Dairy Corp.,* 372 U.S. 29 (1963); and *Beatrice Foods Co.* v. *United States,* 312 F.2d 29 (8th Cir. 1963), *cert. den.* 373 U.S. 904 (1963).

It is thus apparent that the "fully effective enforcement of the merger law" (C.B. 16) is not really in issue, since the Department is fully capable of securing adequate relief on the Commission's behalf. The Commission's argument shifts, therefore, to the contention that if the Department proceeds in the Commission's stead, the Commission's "special knowledge and extensive experience" will allegedly be lost (C.B. 26). But the long record of cooperation between the two agencies affords no indication that this has been a matter of practical concern. On the contrary, during his appearance before the House Antitrust Subcommittee in 1957, the then Attorney General, Herbert Brownell, remarked that "under the present law, of course, we work it out that if a preliminary injunction seems to be required, whether the matter first comes to the attention of the FTC or ourselves, we cooperate with them and bring the necessary action so that it is not as though the situation were critical or anything of that sort, because by liaison machinery we can work this out." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 85th Cong., 1st Sess., ser. 2, at 65 (1957). Moreover, since at least 1948 the Commission and the Department have operated under an informal agreement whereby "the question of which agency should proceed is submitted to a joint conference." REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAW 376 (1955). Indeed, in this very case such a conference was held between the two agencies in

advance of the filing of the Commission's emergency petition (R. 97).

Furthermore, Congress clearly anticipated that cooperation between the two agencies would be required and set up the statutory machinery whereby the Commission's expertise could be brought to bear in cases instituted by the Department. In Section 7 of the Federal Trade Commission Act, Congress provided that "in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon conclusion of the testimony therein, if it shall be then of the opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein." 15 U.S.C. §47. The legislative history confirms that this provision was specifically enacted to "bring both to the Attorney General and to the court the aid of special expert experience and training" which the Commission might acquire. S. Rep. No. 597, 63d Cong., 2d Sess. 12 (1914). Similarly, the House Report noted that "the commission, as an independent body of specialists, will . . . have placed upon it the proper burden of framing the plans for the effective segregation and readjustment of unlawful combinations. . . ." H. R. Rep. No. 533, 63d Cong., 2d Sess. 6 (1914). Additionally, in Section 6(c) Congress made provision for cooperation between the Commission and the Department in enforcing compliance with such orders. 15 U.S.C. §46(c).[10]

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10. The cooperative scheme envisioned by Congress was a reciprocal one. Section 8 of the Federal Trade Commission Act authorizes the transfer of both personnel and records by the Department to the Commission to assist the latter in its enforcement efforts. 15 U.S.C. §48. See, also, Section 11(b) of the Clayton Act authorizing intervention by the Department in proceedings brought by the Commission. 15 U.S.C. §21(b).

Upon analysis, then, each of the reasons advanced by the Commission for resort to the revolutionary procedure it advocates, is found to be chimerical. Accordingly, even were the evidence accumulated in Parts II and III, *infra*, less conclusive of Congress' intent to deny the Commission the right to pre-hearing relief, the Commission has clearly failed to suggest any convincing rationale for resort to the extraordinary procedure it proposes. In sum, the Commission's proposal is nothing more than an effort to increase the Commission's authority at the expense of sound judicial administration by imposing upon the courts of appeals a type of proceeding for which they are ill-suited in an instance where Congress has established an alternative procedure for the securing of identical relief from the district courts.

II. CONGRESS HAS CONSCIOUSLY WITHHELD FROM THE COMMISSION ANY STANDING TO OBTAIN THE TYPE OF PRELIMINARY INJUNCTIVE RELIEF REQUESTED IN THIS CASE.

The Commission repeatedly expresses the issue before this Court in terms of the power of the courts of appeals to grant a writ under Section 1651(a) (C.B. 2). In so doing, it has overlooked an important and, as it turns out, determinative threshold consideration—whether Congress has given the Commission any standing to sue.

As a creature of statute, "the Commission exercises *only* the administrative functions delegated to it by" Congress. *Federal Trade Commission* v. *Eastman Kodak Co.* 274, U.S. 619, 623 (1927); *Humphrey's Executor* v. *United States,* 295 U.S. 622, 628 (1935). The presumption, therefore, is not that the Commission has standing to sue where Congress has failed to provide otherwise. On the contrary, the Commission must point to a specific legislative grant authorizing it to proceed. Yet the Commission's brief may be searched in vain for a citation to any statute granting

the Commission standing to sue for preliminary injunctive relief in merger cases.[11]

The case against the Commission rests on far more than legislative inaction, however. An examination of the statutory scheme adopted for the enforcement of the antitrust laws, together with its legislative history, presents overwhelming evidence of a conscious decision by Congress to withhold from the Commission any standing to obtain a preliminary injunction in the instant case.

A. Congress made no provision for preliminary injunctive relief at the behest of the Commission in the statutory scheme which it adopted for the enforcement of the antitrust laws.

The Commission correctly observes that when Congress enacted Section 7 of the Clayton Act it envisioned a scheme of "dual enforcement" (C.B. 13). Where the Commission misreads both the statute and its legislative history is in its argument that "dual" implies "co-equal" (C.B. 26). When Section 7 is read in the context of the full panoply of antitrust and related statutes committed to the Commission and to the Department of Justice for enforcement, it becomes readily apparent that Congress did not intend identical enforcement powers for the two agencies.[12]

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11. Congress has also provided in Section 2 of the Administrative Procedure Act that the agency must act within the confines of its own published rules. 15 U.S.C. §1002. The Commission's rules, however, make no allowance for the instant type of proceeding.

12. The Commission's attempted reading of Section 7 *in vacuo* does violence to the repeated admonition of this Court that the Sherman, Clayton and Federal Trade Commission Acts must be considered as a interrelated statutory scheme. *Cf.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Federal Trade Commission* v. *Motion Picture Adv. Co.*, 344 U.S. 392 (1953); *Federal Trade Commission* v. *Cement Institute*, 343 U.S. 683 (1948). Moreover, the Commission cannot escape the fact that both its administrative complaint and its emergency petition to the court of appeals were grounded on Section 5 of the Federal Trade Commission Act as well as Section 7 of the Clayton Act. (R. 3, 7).

Although Congress gave the Department of Justice and the Commission "dual authority" to enforce many (though far from all) provisions of the antitrust laws, Congress prescribed quite disparate methods of enforcement for the two agencies. The Department was authorized to proceed judicially, while the Commission was authorized to proceed administratively.

Thus, Congress assigned to the Department of Justice the task of criminal prosecution under Sections 1 through 3 of the Sherman Act, 15 U.S.C. §§1-3, the right to recover damages on behalf of the United States under Section 4A of the Clayton Act, 15 U.S.C. §15(a), and the power to obtain equitable relief, including injunctions against threatened violations of the antitrust laws, under Section 4 of the Sherman Act, 15 U.S.C. §4, and Section 15 of the Clayton Act, 15 U.S.C. §25. Even in the Federal Trade Commission Act, where Congress gave the Commission primary enforcement authority, it made specific provision for the Department of Justice to proceed on the Commission's behalf where resort to the courts was required under Section 9 to obtain "writs of mandamus commanding any person or corporation to comply with the provisions of [the Act] or any order of the commission made in pursuance thereof" and under Sections 10 and 16 for the recovery of penalties for non-compliance with Commission orders. 15 U.S.C. §§49, 50 and 56.[13]

The sole grant of enforcement authority which Congress made to the Commission is contained in Section 11 of the Clayton Act, 15 U.S.C. § 21 and Section 5 of the Federal

13. The Department of Justice is also authorized to sue for the penalties provided for in Section 10 of the Wool Products Labeling Act, 15 U.S.C. §68h, Section 11 of the Fur Products Labeling Act, 15 U.S.C. §69i and Section 11 of the Textile Fiber Products Identification Act, 15 U.S.C. §70i.

Trade Commission Act, 15 U.S.C. § 45. Despite the elaborate detail with which the enforcement powers of the Commission were spelled out in those two sections, not one word, either expressly or inferentially, gives the Commission the right to apply to any court for preliminary relief pending the completion of the Commission's administrative proceedings.

So clear was Congress' intent that the Commission should not have the right to enjoin threatened violations of the antitrust laws, that it did not even authorize the Commission to issue a complaint—as it improperly did in this case—until a violation had actually occurred. Section 11(b) expressly states that a complaint may issue only where the respondent "is violating or has violated" the Clayton Act. 15 U.S.C. §21(b). Similar language appears in Section 5(b) of the Federal Trade Commission Act. 15 U.S.C. §45(b).[14]

The Commission has attempted to foreclose examination of the Congressional intent behind the disparate enforcement procedures which Congress so carefully fashioned when it enacted the Clayton and Federal Trade Commission Acts with the contention that their legislative history is "obscure" and "sheds little light on how Congress intended

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14. The Commission, itself, has recognized its lack of authority to file a complaint prior to the consummation of a merger. See, *e.g., Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., at 53-54 (1958). See, also, Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 404 (1965): "The FTC cannot even issue its complaint until a merger or acquisition has been consummated; it has no power to block a merger entirely." *Cf. United States* v. *Union Oil Co.*, 343 F. 2d 29, 31 (9th Cir. 1965): "Under Section 7 of the Clayton Act an acquisition can be a violation—a proposed acquisition cannot."

the dual enforcement jurisdiction [which] it was creating to operate." (C.B. 24, n. 8) Far from being "obscure", the legislative history, especially of the Federal Trade Commission Act, confirms that Congress wished the Commission to play a limited and carefully circumscribed role in the Congressional scheme of dual enforcement. As finally enacted, the Federal Trade Commission Act reflected a compromise between those who would have restricted the proposed Commission to a mere information-gathering agency (H.R. 15613, the bill as originally passed by the House, would have limited the agency to this narrow role) and those who would have armed the proposed Commission with sweeping enforcement powers co-equal to those of the Department of Justice. See generally Henderson, THE FEDERAL TRADE COMMISSION 19-27 (1924). Indeed, the Congressional Reports were careful to point out that the Commission was being given limited powers and that, while time might indicate the need for new legislation increasing the Commission's powers, "such legislation should come by a sound process of evolution." H.R. Rep. No. 533, 63d Cong., 2d Sess. 8 (1914); S. Rep. No. 597, 63d Cong., 2d Sess. 10 (1914).

B. Congress has repeatedly refused to amend the antitrust laws to give the Commission the right to obtain preliminary relief in merger cases.

Not only did Congress consciously withhold from the Commission any authority to seek preliminary relief in the statutory scheme as originally enacted, it has repeatedly refused to adopt amendatory legislation which would have granted the Commission such authority. During the past twelve years, amendatory legislation which would have granted the Commission the power to obtain preliminary injunctions in merger cases has been introduced in every

Congress from the 84th through the 89th. The total number of bills has been staggering—thirty-seven in all:

84th Congress	85th Congress	86th Congress
S. 3341	S. 198	S. 442
S. 3424	S. 722	S. 2693
H.R. 6748	S. 3479	
H.R. 7229	H.R. 264	
H.R. 9424	H.R. 2143	
H.R. 9968	H.R. 7698	
	H.R. 10196	

87th Congress		88th Congress	89th Congress
S. 166	H.R. 4008	H.R. 594	H.R. 49
S. 2552	H.R. 5624	H.R. 1105	H.R. 1574
H.R. 145	H.R. 6058	H.R. 9941	
H.R. 1181	H.R. 6697		
H.R. 1233	H.R. 6698		
H.R. 1817	H.R. 8317		
H.R. 2282	H.R. 8830		
H.R. 3563	H.R. 8831		
	H.R. 12032		

Not one, however, gained final Congressional approval.[15]

The steadfast refusal by Congress to enact legislation granting the Commission authority to seek pre-hearing relief can hardly be dismissed as Congressional inaction (C.B. 40). Extensive hearings, the reports of which fill five volumes, were held on these legislative proposals during

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15. The Commission's observation (C. B. 40) that these bills would have granted it the right to seek preliminary injunctive relief from the district courts or to issue such injunctions on its own, rather than the right to apply to the courts of appeals for such relief, serves only to underscore the Commission's own recognition that the courts of appeals are an inappropriate forum for the hearing of preliminary injunction proceedings. (See pp. 14-19, *supra*.)

the 84th, 85th and 87th Congresses. *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess., ser. 15 (1956); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., (1956); *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 85th Cong., 1st Sess., ser. 2 (1957); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess. (1958); *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess., ser. 5 (1961). No less than four Congressional Reports were issued in connection with the proposed legislation. H.R. Rep. No. 1889, 84th Cong., 2d Sess. (1956); S. Rep. No. 2817, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 486, 85th Cong., 1st Sess. (1957); S. Rep. No. 132, 85th Cong., 1st Sess. (1957). Running throughout is explicit and repeated Congressional recognition that, absent such amendatory legislation, the Commission had no power to obtain preliminary injunctive relief in merger cases. Nowhere is there evidence to support the Commission's fanciful belief that the generalized provisions of Section 1651(a) were thought by Congress to provide a residuum of statutory authority upon which the Commission could draw for proceeding in the courts of appeals.

Quite the contrary, the Commission's lack of standing to obtain preliminary relief was considered to be absolute. For example, H.R. No. 1889, 84th Cong., 2d Sess. 4 (1956) stressed the "lack of a provision to enable the Commission to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of proceedings." Similarly, the Staff Report of the Senate Subcommittee on Antitrust and Monopoly remarked that "the Federal Trade Commission now lacks the power to seek restraining action of a court to prevent

consummation of a proposed merger or acquisition or to maintain the status quo." It observed, however, that the Commission "does have the right to request the Attorney General to seek such action on its behalf." S. Rep. No. 132, 85th Cong., 1st Sess. 53 (1957). See, also, S. Rep. No. 2817, 84th Cong., 2d Sess. 12 (1956) and H.R. No. 486, 85th Cong., 1st Sess. 2-3 (1957). In making these observations Congress was well aware of the Commission's unsuccessful efforts to use Section 1651(a) as a means of securing injunctive relief. See, *e.g.*, H.R. Rep. No. 486, 85th Cong., 1st Sess. 8-9 (1957); see, also, pp. 43, 44, *infra*.

Those who testified in support of the proposed amendments were equally of the view that only amendatory legislation could give the Commission authority to obtain preliminary relief against challenged mergers. Representative Patman stated categorically that "the Federal Trade Commission has no power to stop a merger before it takes place" (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 15, at 11-12 (1956)); Senator Sparkman observed that "existing law prevents the Commission from moving against mergers prior to consummation and also, from taking action, after consummation, to preserve the status quo pending completion of administrative proceedings before the Commission" (*id.* at 49); and Representative Celler concluded that "equally as necessary as premerger notification is the provision giving the Federal Trade Commission authority to seek a preliminary court injunction to prevent consummation of mergers or after consummation, to preserve the status quo until completion of administrative proceedings before the Commission" (*Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at 123 (1956)).

Even the Commission represented to Congress that amendatory legislation was required to give it the authority it presently professes to possess. For the Commission now to assert (C.B. 40) that it merely "implied" that it lacked such power is, to put it politely, an understatement. The then Chairman of the Commission, Judge Gwynne, could hardly have been more explicit when he advised the Senate Subcommittee on Antitrust and Monopoly in 1956 that there was no "provision which enables the Federal Trade Commission either to take action to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission." *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., at 465 (1956). This followed Chairman Gwynne's earlier statement to the House Antitrust Subcommittee that "the greatest need for amendatory legislation is evident in section 7" where "the Commission must be given additional powers. Basic among these [is] . . . the authority to take action to prevent certain mergers before they are consummated." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess., ser. 15, at 28 (1956).

These same views were expressed by present Chairman Dixon when he told the House Antitrust Subcommittee in 1961 that "the Commission . . . has no authority to prevent mergers or the mingling of assets after mergers have been consummated." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess., ser. 5, at 85-86 (1961). Similar representations were made to the antitrust bar when Chairman Dixon wrote that the Commission lacked "means to obtain injunctions or to maintain the status quo in section 7 cases" and that, accordingly, the Commission had "strongly supported legislation which would amend the Clayton Act to

give it authority to obtain preliminary injunctions in the merger cases." Dixon, *Recent Developments in Federal Trade Commission Enforcement,* 18 A.B.A. Sect. Antitrust L. 107, 114 (1961). See also Dixon, *Significant New Commission Developments,* 21 A.B.A. Sect. Antitrust L. 247, 255 (1962).

Former Commission Chairman Kintner also wrote extensively concerning the "objective which the Commission has sought during 1960 and other years *without success* . . . the drive to secure an amendment to the Clayton Act authorizing the Commission to seek preliminary injunctions" against proposed mergers so that the Commission would not be remitted to seeking the assistance "of the Antitrust Division in . . . instances where a temporary restraining order is peculiarly appropriate." Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra,* 1961 Antitrust Law Symposium 21, 41. And see Kintner, *Developments in Congress of Special Interest to the Federal Trade Commission,* 15 A.B.A. Sect. Antitrust 198, 200 (1959); Kintner, *Developments Under the Anti-Merger Act and Other Aspects of the Federal Trade Commission,* 5 Antitrust Bull. 387, 388 (1960); Kintner, *What's Ahead in Section 7 Enforcement,* 39 U. Det. L. J. 153, 206-207 (1961).

Thus, each of the last three Chairmen of the Commission has recognized on numerous occasions that, absent amendatory legislation by Congress, the Commission lacks authority to seek preliminary relief. Additionally, the Commission's Annual Reports have repeatedly stressed the Commission's ambition to secure amendatory legislation and have noted that "in the absence of such Commission authority, corporations may now complete their merger arrangements or may dispose of assets acquired through

merger in the face of pending Commission proceedings." 1958 Fed. Trade Comm. Ann. Rep. 63-64. The Commission's current report again calls attention to the need for legislation authorizing it to obtain pre-hearing injunctive relief. 1964 Fed. Trade Comm. Ann. Rep. 33.[16]

The Commentators have, without exception, agreed that the Commission has no standing to seek preliminary relief. Indeed, it has been pointed out that "the F.T.C. can, when it wants to enjoin a merger that might violate Section 7, ask the Department of Justice to exercise its authority to sue for an injunction. Yet, it apparently has not made such requests. Instead, it has asked Congress for the power to sue for an injunction on its own." Massel, COMPETITION AND MONOPOLY, LEGAL AND ECONOMIC ISSUES 54, 319 (1962). See, also, Kaysen & Turner, ANTITRUST POLICY 258 (1959); Kronstein, Miller and Schwartz, MODERN AMERICAN ANTITRUST LAW, A GUIDE TO ITS DOMESTIC AND FOREIGN APPLICATION 75-79 (1958); Martin, MERGERS AND THE CLAYTON ACT 303-304 (1959); Comment, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act,* 40 N.Y.U. L. Rev. 771 (1965); Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act,* 79 Harv. L. Rev. 391, 402-405 (1965); Comment, 32 N.Y.U. L. Rev. 1297 (1957).

Notwithstanding this uniform recognition by Congress, the Commission, the commenators and (as will be shown, *infra*) the courts, that the Commission has no standing to obtain preliminary injunctive relief in a merger case, either from the courts of appeals or elsewhere, Congress has not seen fit to grant the Commission that power.[17] This

16. It appears unreasonable to assume that the Commission would have expended such effort to secure legislation which it now argues is superfluous.

17. The House did pass H.R. 9424 in 1956, but it failed to gain the approval of the Senate.

despite the fact, shown by the following comparison, that Congress was presented with the very same arguments in support of the amendatory proposals which are now presented to this Court:

"[T]he Federal Trade Commission cannot effectively play its role in the antitrust field without authority to secure injunctive relief." (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 5, at 43 (1961))	"The Commission cannot fulfill its intended role in section 7 enforcement if denied the power to obtain preliminary relief. . . ." (C.B. 27)
"[I]n many mergers the acquired competitor is completely swallowed up and . . . [i]t is practically impossible thereafter to restore completely the preexisting competitive situation." (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 15, at 29 (1956))	"[T]he operations of the acquired company may be so completely mingled with those of the acquiring that it is impossible to disentangle them." (C.B. 30)
"Since the Federal Trade Commission has concurrent responsibility with the Attorney General to enforce that act, logic and policy dictate that the Commission have coextensive authority. . . ." (*Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at 124 (1956))	"Congress intended the Commission to play an effective enforcement role, fully co-equal with the Department of Justice. • • • The system is gravely undermined if . . . only the Department may obtain preliminary relief in a merger case." (C.B. 11)
"[E]ffective administration of the AntiMerger Act requires that the Commission be given . . . authority to take action to prevent certain mergers before they are consummated." (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 15, at 28 (1956))	"[T]he availability to the Commission of preliminary relief in appropriate cases is essential to the Commission's merger enforcement program. . . ." (C.B. 27)

The legislative rejection of these contentions, which has been manifested by the repeated refusal of Congress to amend the antitrust statutes to grant the Commission the power to obtain preliminary injunctive relief, precludes their reargument before this Court. As this Court pointed out in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 479 (1952), "effective enforcement of the Clayton Act by the Commission may be handicapped by the present provision, but that is a question of policy for Congress." See, also, *Commissioner* v. *Brown*, 380 U.S. 563 (1965), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953).[18]

C. In contrast to the merger field, Congress has expressly granted the Commission authority to seek preliminary injunctions in other carefully circumscribed areas.

The refusal by Congress to accord the Commission any broad power to obtain preliminary injunctive relief takes on added significance when contrasted with the explicit grant of such power to the Commission which Congress

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18. There is no merit to the Commission's argument that the 1950 amendments to the Clayton Act were intended in any way to grant it "co-equal" powers with the Justice Department. While the Commission flatters itself with the notion that "the legislators thought primarily in terms of strengthening the Commission's powers" (C.B. 25), the simple fact is that the purpose of the 1950 amendments was to close a long-standing loophole in the Clayton Act by amending "section 7 so as to prohibit the acquisition of assets as well as stock of a competing corporation." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 5 (1949), and see S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950). To the extent that this loophole was closed, there was a "strengthening" of the powers of all enforcement agencies. Indeed, if Congress singled out any particular enforcement agency for a special "strengthening" of powers, it was the Department of Justice, which was authorized "to intervene and appear in any proceeding brought by any Commission, Authority or Board to enforce sections 2, 3, 7, or 8 of the Clayton Act." S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).

has made in certain limited areas. For example, Congress amended Section 13 of the Federal Trade Commission Act in 1938 to provide that the Commission should have the right to apply to the district courts for temporary injunctions pending the completion of administrative proceedings involving the dissemination of false advertising. 15 U.S.C. §53. Congress also made express provision for the Commission's right to sue for preliminary relief in the Wool Products Labeling Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953 and the Textile Fibre Products Identification Act of 1958. 15 U.S.C. §§68e, 69i, 70i and 1195.

Thus, on at least five occasions since the enactment of the Clayton and Federal Trade Commission Acts in 1914, Congress has acted to grant the Commission the express power to obtain preliminary relief. It is evident, therefore, that where Congress wished the Commission to have the right to such relief, it specifically so provided. It is equally apparent that Congress did not believe the "all writs" statute conferred such authority on the Commission absent a specific legislative grant. Finally, where Congress has authorized the Commission to proceed, it has been before the district courts, not the courts of appeals.

The Commission argues, however, that Section 13 of the Federal Trade Commission Act has "nothing to do" with the proper interpretation of the Commission's powers under other provisions of that Act or the Clayton Act (C.B. 38). But the Commission loses sight of the fact that Section 13 was made an integral part of the Federal Trade Commission Act, as amended. Indeed, "false advertising" is expressly declared by Section 12 of the Act to be "an unfair or deceptive act or practice in commerce within the meaning" of Section 5, one of the two statutory bases for the Commission's complaint in this case. See 15 U.S.C. §52.

Similarly, the Wool, Fur, Textile and Flammable Fabrics Acts cannot be swept aside as having no bearing on the Commission's power to seek preliminary injunctive relief for alleged violations of Section 7 of the Clayton Act and Section 5 of the FTC Act. On the contrary, they offer a revealing insight into Congress' intent with respect to the Commission's injunctive powers. Section 6 of the Wool Products Labeling Act, for example, provides that the Commission is authorized "to prevent any person from violating the provisions [of the Act] . . . in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of" the Act. 15 U.S.C. §68d. Similar provisions appear in the other Acts. 15 U.S.C. §§69f, 70e and 1194. Despite these sweeping incorporations of the Federal Trade Commission Act, Congress felt it necessary in each case explicitly to grant the Commission the right to seek injunctive relief.[19]

Thus, the affirmative action which Congress has taken specifically to grant the Commission authority to proceed in these limited areas reinforces the conclusion that, absent such an express grant, Congress neither believed nor intended that the Commission could obtain pre-hearing relief.

III. THE ALL WRITS STATUTE MAY NOT BE USED TO CIRCUMVENT THE LIMITS ON COMMISSION AND JUDICIAL POWER WHICH CONGRESS HAS IMPOSED.

The court below was patently correct in concluding that the Commission's lack of "authority to institute this pro-

19. Congress has been equally specific when it wished to authorize other administrative agencies to obtain preliminary injunctive relief. See, *e.g.*, 49 U.S.C. §§5(9), 43 (ICC); 29 U.S.C.§160(j), (1) (NLRB); 16 U.S.C. §825m(a) (FPC); 15 U.S.C. §77t(b) (SEC); 15 U.S.C. §78u(e) (SEC); 49 U.S.C. §1487(a) (CAB).

ceeding" is dispositive of the case (R. 154). Whatever the effect of the "all writs" statute on the power of the courts, it adds nothing to the power of the Commission. The Commission's position would not be advanced, however, even if the issue were the power of the courts of appeals to issue a writ under Section 1651(a). Congress has been as precise in withholding from the courts of appeals any jurisdiction to issue preliminary injunctions pending completion of the Commission's hearings and order as it has been in denying the Commission the standing to seek such relief. Since the office of an extraordinary writ is to protect, not to expand, the jurisdiction which Congress has conferred on the courts, the "all writs" statute does not avail the Commission in any event.

Only recently, this Court remarked in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964), that "extraordinary writs are 'reserved for really extraordinary causes,' *Ex parte Fahey*, 332 U.S. 258, 260 (1947)." By the terms of the statute, such writs must be "in aid of" the jurisdiction of the court which Congress has conferred. 28 U.S.C. §1651(a). The statute "does not enlarge or expand" that jurisdiction "but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and already lodged in the courts." *United States* v. *First Federal Savings and Loan Ass'n.*, 248 F.2d 804 (7th Cir. 1957). It is because a Section 1651(a) writ cannot be employed to circumvent express Congressional limitations on judicial power that this Court has repeatedly recognized that "where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions. . . ." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943). See also *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953); *Parr* v. *United States*, 351 U.S. 513 (1956).

Here, Congress has explicitly established that the jurisdiction of the courts of appeals over proceedings instituted by the Commission shall attach only after full administrative hearing, the entry of a cease and desist order and the filing of a petition for review. Section 11(c) of the Clayton Act states unequivocally: "*Upon such filing of the petition* the court shall have jurisdiction of the proceeding. . . ." 15 U.S.C. §21(c). Identical language appears in Section 5(c) of the Federal Trade Commission Act. 15 U.S.C. §45(c).

This limitation on the jurisdiction of the court of appeals applies not only to its jurisdiction over the case on the merits, but also to its jurisdiction to issue relief *pendente lite*. Both Sections 11(c) and 5(c) specifically provide that the jurisdiction of the court "to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*" shall be conditioned "upon such filing of the petition" for review. It is especially significant that when Congress added the provision regarding relief *pendente lite* to Section 11(c) by way of amendment in 1959, it chose expressly to retain the jurisdictional prerequisite that a petition for review shall first have been filed. 73 Stat. 243.

The Commission makes the peculiar argument that no importance can be attached to this amendatory action "since the entire focus of the Finality Act [of which the 1959 amendment was a part] was upon the problem of effective enforcement of Commission orders." (C.B. 36, 37.) But if the issue here truly concerned the Commission's "effective enforcement role," as the Commission repeatedly asserts (*e.g.*, C.B. 11), it is difficult to comprehend why Congress should have felt itself constrained to limit its consideration of relief *pendente lite* to cases "where the Commission's order had already been entered" (C.B. 37).

The Commission's contention that "the problem of ancillary relief while the proceeding was pending before the Commission—the problem of this case—was never alluded to in the deliberations on the Finality Act" (C.B. 37) is even more absurd. Both the proposed Finality Act and the proposed legislation to grant the Commission authority to secure pre-hearing relief were referred to the same Senate Committee. Even more significantly, after *simultaneous* hearings on these two matters had been held (*Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess. (1958)), only the Finality Act was reported favorably out of the Judiciary Committee. S. Rep. No. 1808, 85th Cong., 2d Sess. (1958).[20]

During the course of these and other hearings, Congress was repeatedly reminded by the Commission that it had only recently been twice rebuffed by the courts of appeals (*Federal Trade Commission* v. *International Paper Co.*, 241 F. 2d 372 (2nd Cir. 1956), and *Federal Trade Commission* v. *Farm Journal, Inc.* (3rd Cir. 1955, unreported)) in its efforts to secure a preliminary injunction pending the completion of its administrative proceedings. *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess., ser. 15, at 35 (1956); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., at 254 (1956); *Hearings before the Anti-*

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20. These were the only hearings which the Judiciary Committee held concerning the Finality Act. The bill was reported to the Senate shortly before the adjournment of the 85th Congress and failed to secure House approval. It was, therefore, re-reported to the Senate by the Judiciary Committee, *without further hearings,* shortly after the 86th Congress was convened. S. Rep. No. 83, 86th Cong., 1st Sess. 2 (1959).

trust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 2, at 103 (1957); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., at 42-45 (1958); *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 5, at 87 (1961).

In both those cases the Commission had proceeded on exactly the same theory of Section 1651(a) jurisdiction which was rejected by the Seventh Circuit below. In the *Farm Journal* case, the Third Circuit "summarily denied" the Commission's petition without an opinion.[21] The Second Circuit, on the other hand, wrote an opinion which carefully considered each of the contentions made to this Court and rejected them out of hand. It reasoned that "the specific provisions as to who may seek injunctive relief, and in what courts, imply that the Commission itself is not authorized to do so." 241 F. 2d at 373. In fact, "[t]his implication is required by the statutory provisions" pursuant to which the courts of appeals acquire jurisdiction "only after the administrative proceeding has been concluded" (*ibid.*). "[S]ince the pattern of enforcement adopted by the Congress in the Clayton Act makes clear that the Commission was not intended to have such authority, the 'all writs' section cannot be invoked to circumvent this limitation" (*ibid.*).

The Commission did more than bring those cases to Congress' attention, however; it candidly admitted that they were correctly decided. Chairman Gwynne, during his ap-

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21. For a discussion of the *Farm Journal* decision, see *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., at 42-43 (1958).

pearance before the Senate Subcommittee on Antitrust and Monopoly in 1958, acknowledged that the Commission's effort in the *International Paper* case "was, frankly, as you probably know, something of a forlorn hope." *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2nd Sess. 45 (1958). Even more instructive is the following exchange between Chairman Gwynne and Senator Kefauver:

> "Senator KEFAUVER. Was that case presented to the Supreme Court by certiorari?
>
> "Mr. GWYNNE. No, we did not. We talked that over. I could not help but agree with the court, frankly. I think the remedy is to amend the law. I think we are all more or less—
>
> "Senator KEFAUVER. I think you are right about it." (*Ibid.*)

It is evident, therefore, that the failure of Congress to grant the courts of appeals the power to issue preliminary injunctions pending completion of the Commission's administrative hearings was not mere oversight, but a conscious decision to withhold such jurisdiction. Further evidence is offered by the striking contrast between the silence of Congress with respect to the jurisdiction of the courts of appeals on this question and the very explicit fashion in which Congress spelled out the jurisdiction of the district courts to issue pre-hearing relief in Clayton and Sherman Act proceedings brought by the Department of Justice. See 15 U.S.C. §§4, 9 and 25.

The decisions of this Court—including the very cases cited by the Commission — amply support the conclusion that where, as here, Congress has so plainly manifested its intention in the specific provisions of the antitrust laws

that the courts of appeals should not have jurisdiction to issue preliminary injunctions pending the completion of the Commission's hearings, the generalized provisions of the "all writs" statute cannot be used to confer that jurisdiction. Thus, in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658 (1963), this Court refused to sanction an injunction against a proposed reduction in rail rates pending the completion of hearings before the Interstate Commerce Commission. Although recognizing that neither the statute nor the legislative history afforded "unambiguous evidence of a design to extinguish whatever judicial power may have [formerly] existed . . . to suspend proposed rates" (p. 664), this Court nonetheless concluded that the specificity with which Congress, in the Interstate Commerce Act, had lodged suspension power in the Commerce Commission could only be read as having that effect.[22] In reaching this conclusion, reliance was placed on the "detailed consideration" which Congress gave to the suspension power, on the uniform holdings of the "lower federal courts" and on the consistent opinions of the "commentators on the matter". 372 U.S. at 667-8. And in the very footnote cited by the Commission (C.B. 18), this Court pointed out that the "limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction . . . has never been recognized in derogation of . . . a clear congressional purpose to oust judicial power." 372 U.S. at 671, n. 22.

Likewise, in *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411 (1965), this Court found that the statutory scheme of review specifically provided for by Congress in the Bank Holding Company Act of 1956 barred resort to the district

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22. The Commission, itself, concedes that this abrogation of the "inherent equity powers" of the courts was implicit rather than explicit. (C.B. 22, n. 5).

courts for injunctive relief pending completion of that review procedure. "That Congress has not expressly provided that the statutory review procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts." *Id.* at 422. Also in point are *Roche, Bankers Life,* and *Parr,* referred to earlier (p. 41), in which this Court confirmed that where Congress has established a specific statutory scheme for appellate review, Section 1651(a) cannot be used to override the conditions under when the jurisdiction of the courts of appeals shall attach.

Even if Congress had not pre-empted the application of the "all writs" statute by the specific delineation which it has given to the jurisdiction of the courts of appeals in the antitrust statutes, no decision by this or any other court has ever sanctioned the use of an extraordinary writ in the type of case presented here. The Commission's proposition that this Court has authorized the issuance of a Section 1651(a) writ to "maintain the *status quo* by injunction pending a review of an agency's action through the prescribed statutory channels" (C.B. 18) fails to take account of two very important conditions which have been placed on the issuance of a writ to accomplish this purpose. All of the decisions authorizing the issuance of a writ to "maintain the *status quo*" have been in instances where either (1) the court already had jurisdiction or (2) there would otherwise have been a complete ouster of its potential jurisdiction.

Scripps-Howard Radio v. *Federal Communications Commission,* 316 U.S. 4 (1942), upon which the Commission places considerable reliance (C.B. 15, 18, 35, 36), falls into

the former category. It dealt with the "conventional power of an appellate court to stay the enforcement of an [agency] order pending the determination of an appeal challenging its validity" *after the court of appeals had obtained jurisdiction of the appeal.* 316 U.S. at 16. See also *Whitney Bank* v. *New Orleans Bank,* 379 U.S. 411 (1965).

Board of Governors v. *Transamerica Corporation,* 184 F.2d 311 (1950), *cert. den.* 340 U.S. 883 (1950, on the other hand, belongs to the second category of cases—those where a complete ouster of future jurisdiction was at issue. The Commission, itself, in the application for preliminary injunction which it filed with this Court, characterized the case as "distinguishable" (p. 6).[23] *Transamerica* involved a complaint under Section 7 of the Clayton Act prior to the 1950 amendment which made it applicable to asset acquitions. At that time it was possible, even after administrative hearings had been commenced, for a respondent completely to oust the agency of its jurisdiction by transferring the assets of a corporation whose stock had been acquired to a different entity. See, *e.g., Arrow-Hart & H. Co.* v. *Federal Trade Commission,* 291 U.S. 587 (1934). The Ninth Circuit's holding that it had power under the "all writs" statute to enjoin such a threatened transfer was thus predicated on the fact that otherwise the jurisdiction of both the Board of Governors and the court of appeals would have been completely and irretrievably lost.

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23. Aside from casting considerable doubt on the validity of *Transamerica,* the commentators have also uniformly recognized that it presents no conflict with the situation presented here. Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act,* 79 Harv. L. Rev. 391, 405 (1965); Comment, 32 N.Y.U. L. Rev. 1297, 1299, 1300 (1957).

The situation presented by *International Paper, Farm Journal* and the present case is entirely different. There is no action which the respondents can take which will result in any loss of *jurisdiction* either by the Commission or the court of appeals. The Commission will be able to proceed with its hearings regardless of whether its petition is denied and the court of appeals will similarly have an opportunity to review any Commission order which may be entered on the merits.

The Commission's attempt to create an entirely new category of cases to which this Court should stretch the "all writs" statute—that is, cases where there is neither present jurisdiction nor a threatened ouster of future jurisdiction, but solely a claim that the Commission will allegedly be unable to issue what it views as "an effective order" (C.B. 18, 19)—finds no support in any of the decisions to which the Commission makes reference. Thus, in both *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648 (1935), and *Looney* v. *Eastern Texas R.R. Co.*, 247 U.S. 214 (1918), the district courts had already obtained jurisdiction over the proceeding prior to the issuance of the injunction involved. And, as this Court remarked in *Looney:* "The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice." 247 U.S. at 221. *McClellan* v. *Carland*, 217 U.S. 268, 280 (1910), on the other hand, was an instance, like *Transamerica*, involving the "rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate

jurisdiction which might otherwise be *defeated* by the unauthorized action of the court below."[24]

To fill the manifest lack of judicial, as well as statutory, authority for its application to the courts of appeals for pre-hearing relief, the Commission takes the extraordinary position that the denial of such a remedy would "subordinate the public rights vindicated by the Commission to the private interests of persons affected by administrative proceedings" since, according to the Commission, "a competitor or customer affected by the merger could *presumably* invoke the court's all-writs powers" (C.B. 21). But it is equally clear that no decision of this Court, or of any other court, would allow such a private party to invoke the jurisdiction of the court of appeals under the "all writs" statute in the instant type of case. It is true that a private individual could challenge the merger in a separate equity action brought in the district court, but that is solely because Congress has expressly granted such a remedy under Section 16 of the Clayton Act, 15 U.S.C. § 26.

In sum, the only pertinent judicial precedents, the plain language of the statutes, the overwhelming legislative history, the Commission's own public pronouncements and the uniform opinion of the commentators all dictate the conclusion that the "all writs" statute may not be used by the Commission to secure preliminary injunctive relief pending the completion of its administrative hearings.

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24. Also at issue in *McClellan* was the application of the "all writs" statute (and, more specifically mandamus) to a category of cases not pertinent here — those where the lower court either has refused to take jurisdiction or was clearly acting beyond the bounds of its authorized jurisdiction. See, *e.g.*, *Ex Parte Morgan*, 114 U.S. 174 (1885); *Ex Parte United States*, 287 U.S. 241 (1932); *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945).

IV. EVEN ASSUMING THE COMMISSION'S STANDING TO SUE, THE JUDGMENT SHOULD BE AFFIRMED SINCE THE COMMISSION, ON THE UNCONTROVERTED FACTS OF RECORD, IS NOT ENTITLED TO A PRELIMINARY INJUNCTION IN ANY EVENT.

From the outset of this litigation, it has been apparent that the competitive realities of the challenged acquisition —as opposed to the Commission's *a priori* theories—would never sustain the Commission's case for a preliminary injunction. While the Seventh Circuit did not reach the merits of the Commission's petition, it is well settled that a reviewing court may affirm on any ground which will sustain the judgment below. It is not necessary that the ground be the same as that on which the lower court based its decision. See, *e.g., Riley Co.* v. *Commissioner,* 311 U.S. 55, 59 (1940) and *Ryerson* v. *United States,* 312 U.S. 405, 408 (1940). Since, quite apart from the insubstantial character of the Commission's jurisdictional claims, the uncontroverted facts of record so clearly preclude the Commission's request for preliminary relief on the merits, and any unnecessary prolongation of this Court's stay will cause irreparable injury to the respondent Dean, we strongly urge that the writ of certiorari should be dismissed forthwith as improvidently granted.

The Commission itself conceded below that a preliminary injunction cannot issue, even assuming jurisdiction, unless there is "a likelihood of ultimate Government success on the merits" (Mem. in Support of Emergency Pet. 16). Actually, the showing is an even more demanding one where an extraordinary writ is sought under §1651(a). As this Court stated in *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 384 (1953), "the petitioner has . . . the burden of showing that its right to issuance of the writ is 'clear and indisputable.' *United States* v. *Duell,* 172 U.S. 576, 582 (1899)."

Regardless of the stringency of the test, however, the Commission cannot meet it. The only pretense for the Commission's complaint is its two-fold hypothesis that the sale of Bowman's operating assets to Dean purportedly eliminated Bowman as a viable competitor and thereby increased concentration in the Chicago milk market. Both propositions are confounded by the facts of record; facts which neither have been nor can be refuted.[25]

1. The unchallenged statements of Bowman officials and shareholders establish that Dean had nothing to do with Bowman's decision to abandon its dairy business. Bowman's operating reverses had reached such proportions prior to sale that its owners had decided to withdraw from the dairy business in any event. In the Chicago metropolitan market, where the bulk of Bowman's business was located and the Commission has elected to rest its case, Bowman's sales had declined from $56.8 million in 1960 to $46.6 million in 1964, while its operating losses had risen from $197,000 to $1,572,000.

Equally indisputable is the fact that every effort had been made by Bowman's management to effect an internal solution to the company's operating and financial plight. However, important changes in consumer buying habits had resulted in disastrous sales declines in home delivery and, despite strenuous management efforts, Bowman had been unable to build adequate supermarket volume to offset these losses. The result had been an alarming rise in operating costs. Moreover, in an industry where modern production facilities are essential to continued competitive vitality, Bowman's plants and equipment had become in-

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25. Since the facts which were established in the extensive affidavits filed below by respondents remain unchallenged, the Commission is patently in error in contending that this Court must "assume" the allegations in the Commission's petition "to be true" (C.B. 18).

creasingly obsolescent as management had found the return from its dairy operations grossly inadequate to justify substantial capital improvements.

Faced with the prospect of increasing operating losses and the absence of an internal solution to its problems, Bowman's owners concluded that they had to find a buyer for the company's dairy business. Dean was their last resort, and they decided that if that sale did not go through, they would effect a piecemeal liquidation on their own. Accordingly, contrary to the Commission's repeated assertions, the sale to Dean did not eliminate Bowman as a "substantial competitor" (C.B. 2). Quite apart from the fact that a company which is losing over a million dollars a year in the Chicago market can hardly be classified as viable, the Commission ignores that Bowman would have gone out of business under any circumstances. This is highlighted by the fact that, even if Bowman could be reestablished in the dairy business through judicial fiat, its owners would proceed with a piecemeal liquidation on their own.[26]

2. The second premise on which the Commission has rested its case is equally untenable. It mechanically as-

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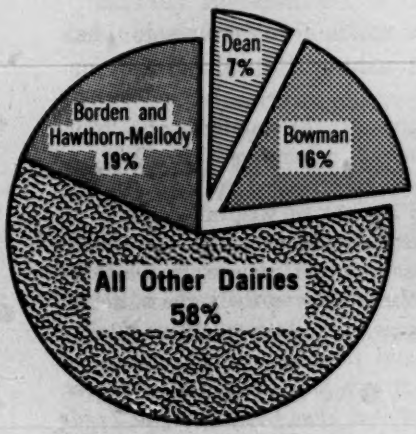
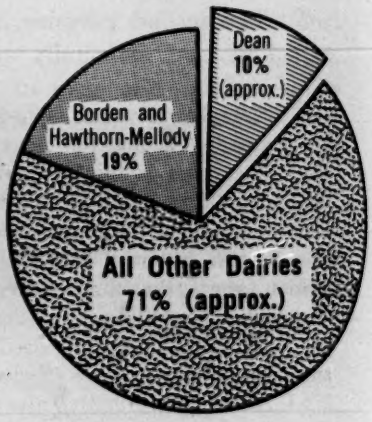
26. Whether Bowman technically met the standards of a "failing company" is not the issue here. (Compare C.B. 31-32, n. 16). The point is that its owners had decided to close out the company's dairy business and no amount of wishful thinking on the Commission's part can reconstitute the company. It should be remarked, however, that the cases do not require, as the Commission asserts, that the acquired concern be on the verge of actual bankruptcy, providing, as is the case here, its competitive vitality has been significantly impaired and there are no indications of any other anticompetitive effects. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319 (1962); *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930); *Beegle* v. *Thomson*, 138 F. 2d 875 (7th Cir. 1943); *Northwest Airlines, Inc.* v. *C.A.B.*, 303 F. 2d 395 (D.C. Cir. 1962); *United States* v. *Gimbel Bros.*, 202 F. Supp. 779 (E.D. Wis. 1962); *United States* v. *Ling-Temco Electronics, Inc.*, 1961 Trade Cas. 78,621 (N.D. Tex.).

sumes that, because Bowman had 16% of the Chicago market before the sale and Dean had 7%, the acquisition must result in a combined market share of 23%, with Dean the leading seller in the market by a substantial margin (C.B. 31, n. 16). Though a sound exercise in arithmetic, the Commission's assumption overlooks that Dean, acting under the express exception to the stay which this Court has imposed, has already resold to smaller dairies in Chicago a large part of the home delivery routes which accounted for 50% of Bowman's Chicago sales volume. Also ignored is Dean's imminent loss of its largest customer, Jewel Tea, which has accounted for 75% of Dean's Chicago sales. As the following chart graphically reveals, the net effect of these developments will be to leave Dean with a market share only slightly larger than it had before the acquisition and well below that which was accounted for by Bowman alone. In fact, with the loss of the Jewel account, Dean would be an insignificant factor in the Chicago market absent the acquisition.

BEFORE[27]



AFTER[28]



27. This chart appeared (following p. 9) in the Commission's memorandum to the Seventh Circuit in support of its emergency petition.

28. This chart indicates the competitive situation which will obtain following Dean's sale of the former Bowman home delivery routes and the loss of the Jewel account.

The Commission is thus in the anomalous position of urging the condemnation of an acquisition which has substantially *decreased* concentration and appreciably strengthened smaller dairies. As the facing chart shows, the market share of "all other dairies" will increase from 58% to as much as 70% or more of the Chicago market. The acquisition will, accordingly, continue the trend toward declining concentration in the Chicago market already evident in statistics compiled by the Department of Agriculture showing that the share of the four largest dairies had dropped from 52% in 1954 to 42.3% in 1961.[29] Indeed, reference to the Department of Agriculture figures demonstrates that, *as a direct result of this transaction,* Chicago will become the least concentrated of the 59 milk marketing areas in the United States for which statistics were published. The acquisition will additionally help to counter any attrition in the number, as opposed to the market share, of smaller dairies (see C.B. 5) since Dean's disposition of the former Bowman home delivery routes will enable these smaller firms to reduce distribution costs and increase operating efficiency.

To the extent that the Bowman volume which Dean may hope to retain offsets the loss of the Jewel account and gives Dean the wherewithal to maintain its position as an effective regional competitor, the acquisition serves a purpose which the Commission itself has stressed—that of developing "a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the giant firms." *Beatrice Foods Co., supra,* p.

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29. Dept. of Agriculture, MARKET SHARES IN FLUID MILK MARKETS 30 (rev. ed. April, 1964). Statistics for the period since 1961 are not available.

22, 337,[30] It will also permit Dean to maintain the efficiency required to suppy low-cost dairy products to independent grocers, thereby enabling them to remain competitive with corporate and cooperative supermarket chains owning their own dairy facilities.

Clearly, the Commission not only has no case, but there is not even a remote possibility that it can make one out. This is tellingly brought home by its inability, despite a canvass of the Chicago market, to find a single dairy competitor, milk supplier or customer who would support its case before the court of appeals. In marked contrast, the respondents secured statements from knowledgeable industry witnesses who detailed the facts which led them to the conclusion that Bowman's sale of its dairy business to Dean could have "no conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally." (See Statement, pp. 6, 7, *supra.*)

Since there is no likelihood whatever that the Commission will be able to sustain its case on the merits, it would be unjust, as well as unrealistic, to force Dean to maintain assets, which had collectively been generating substantial losses prior to the sale, intact pending lengthy hearings before the Commission and the courts. If it was futile to think of maintaining Bowman as an effective competitor before the sale of its operating assets to Dean, it is even

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30. Dean is just such a firm. The Commission's frequent reference to Dean as the "12th largest dairy" overlooks the substantial "disparity in size between the eight or nine largest [dairies] and even the larger independents" noted in the *Beatrice* opinion (*id.* at p. 22,326).

more unrealistic to think that those assets could be kept in *status quo* pending an eventual ruling on the merits and then converted into "a viable independent company" (C.B. 6). This Court has already given some recognition to this fact by authorizing the sale of the former Bowman home delivery routes. Pressing problems remain, however. If the existing stay is continued, Dean will be compelled to sustain the heavy operating losses necessarily attendant upon maintaining the now half-full Chicago plant which formerly supplied those routes. Moreover, as long as the future of the former Bowman operations remains uncertain, key employees and customers may be lost at any time.[31] In addition, steps must be taken to scrap outmoded plant and equipment and other Bowman operations must be integrated with those of Dean if necessary cost-cutting is to be effected and Dean is to salvage its heavy commitment to the Bowman transaction. In short, it would unnecessarily penalize Dean to saddle it with the losses inherent in a further stay, on the very dubious assumption that the Commission will prevail on the merits and in the quixotic hope that Bowman could be reconstituted as a going concern in the dairy business.

CONCLUSION

Since the Commission's case, both on the law and the facts, is so utterly lacking in merit, we submit that the writ of certiorari should now be dismissed as improvidently

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31. Just within the past month, six of the former Bowman managerial personnel have left the company.

granted or, at the very least, that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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